87-186

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MOLDED ACOUSTICAL PRODUCTS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. Does a union's offer to waive initiation fees for all employees who vote for the union in an NLRB election destroy the laboratory conditions required for such an election?

PARTIES TO THE PROCEEDING

Petitioner Molded Acoustical Products, Inc. is an independent corporation that has a number of wholly owned subsidiaries. It has no affiliates.

The National Labor Relations Board is a respondent in this Court. Local 773 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was an intervenor in the court of appeals and is a respondent here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Molded Acoustical Products, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on April 8, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit will be reported at 815 F.2d 934 and is reproduced in Appendix A, *infra*, at pages 1a-21a.

The National Labor Relations Board "Decision and Certification of Representative" is reported at 273 N.L.R.B. 156, and is reproduced in Appendix B, *infra*, at pages 22a-26a. The Regional Director's report, upon which the National Labor Relations Board based its "Decision and Certification of Representative" is unreported and is reproduced in Appenidx C, *infra*, at pages 27a-30a.

The National Labor Relations Board Order of July 31, 1986, reported at 280 N.L.R.B. No. 163, and pertinent portions of the recommended order of the administrative law judge upon which the Board based its Order are reprinted in Appendix D, *infra*, at pages 31a-39a.

JURISDICTION

The Court of Appeals entered its judgment on April 8, 1987 [Appendix A, *infra*, pp. 1a, 51a]. Timely petitions for rehearing and rehearing *en banc* were denied on May 4, 1987 [Appendix E, *infra*, pp. 40a-41a]. This Court has jurisdiction to review the judgments of the Court of Appeals by writ of certiorari under Section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

The Petitioner alleges violations of sections 7, 8(b)(1), and 8(c) of the National Labor Relations Act (the "Act" or the "NLRA"), 29 U.S.C. §§ 157, 158(b)(1), and 158(c).

Sections 7, 8(b), and 8(c) provide in pertinent part:

> Section 7.
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except

to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) ....

* * * *

Section 8(b)(1).

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * *

Section 8(c).

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Respondents allege violations of sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(5). Those sections provide in pertinent part:

Section 8(a).

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

...

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) ...

STATEMENT OF THE CASE

Petitioner Molded Acoustical Products, Inc. ("Petitioner" or the "Company") is engaged in the molding of fiberglass products for thermal and acoustical application. On October 26, 1983, Local 773 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union" or the "Teamsters") filed a petition under section 9 of the NLRA, seeking to represent certain employees of the Company.

The Company and the Union entered into an election agreement on November 14, 1983, which was approved the next day by the Regional Director of the Board. The Company and the Union further agreed that participation in the election would be limited to all full-time and regular part-time production and maintenance employees at the Company's Main Street facility.

At the heart of this case is a letter sent by the Teamsters on December 19, 1983 to all employees in the proposed bargaining unit. In that letter, the Union made the following statement:

> All employees in the bargaining unit will not have to pay the the [sic] $50.00 Initiation Fee if they vote for the Teamsters to represent them.

[App. F, *infra*, p. 43a]. The Union made no other statements, written or oral, to clarify this inducement to vote for representation.

Eleven days later, on December 30, 1983, 60 employees cast their ballots for the Union while 55 voted against representation. Eight ballots were challenged.

On January 5, 1984, the Company filed timely Objections to the Conduct Affecting Election under section 102.69 of the Board's rules and regulations, requesting the Regional Director to set aside the election and to direct a second election on the grounds that the Teamsters' offer to waive initiation fees violated this Court's pro-

nouncements in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973) and related decisions of the Board.

By way of report and recommendation to the Board, the Regional Director rejected the Company's objection and recommended certification of the Union on the following grounds:

> While the Petitioner's December 19, 1983, letter may have been inartfully drafted, it is sufficiently clear that the statement means that the Union would waive payment of its initiation fee for all bargaining unit employees, without distinction, if the Union won the Board election and became their collective bargaining representative. There was no requirement that employees join the Union or take any other action before the election as a condition of the Union's offer to waiver [sic] the initiation fee. As the waiver of the initiation fee was offered to all employees unconditionally, I find that the Petitioner did not violate the *Savair* rule.

[App. C, *infra*, p. 29a].

The Regional Director thus relied exclusively on the language of the letter to conclude that the Teamsters' fee waiver offer applied to all bargaining unit employees and did not violate the *Savair* rule.

The Company filed timely exceptions to the Regional Director's Report and Recommendations on the grounds that the Regional Director (1) misapplied *Savair* and thereby sanctioned proscribed union conduct, (2) violated established Board policy which, consistent with *Savair* principles, mandates that any ambiguity in an initiation fee waiver offer be construed against the drafting union, and (3) improperly refused to conduct an investigation of the matter to ascertain its impact on eligible voters. [App. G, *infra*, pp. 44a-49a].

A divided panel of the Board adopted the Regional Director's findings and recommendations in a decision reported at 273 N.L.R.B. 156 (1984) [App. B, *infra*, pp.

22a-26a]. By way of footnote, Chairman Dotson stated that the Company's interpretation of the Union's offer—that only those employees who voted for representation would qualify for the waiver—was "unreasonable in light of the Board's fully publicized secret-ballot procedure." [App. B, *infra*, p. 22a].

Dissenting, Board Member Hunter would have set aside the election because "the union engaged in objectionable conduct by making an impermissible offer to waive its initiation fee." [App. B, *infra*, p. 24a]. Explaining his position further, Board Member Hunter stated:

> Contrary to the Regional Director, I find that the Petitioner's statement in its 19 December 1983 letter with respect to the waiver of the initiation fee is ambiguous on its face. In the Regional Director's view the above statement is to be read as an unconditional offer to waive the initiation fee for all unit employees. However, the Regional Director's interpretation is not the only plausible interpretation. Rather, the statement is equally susceptible of the interpretation that the offer to waive the initiation fee was conditioned on the individual employee's vote in the election and in my view the employees reasonably could have so construed the statement. Such a waiver offer is impermissible under *Savair*. It is also well established that in circumstances, as here, in which a union's offer to waive initiation fees is ambiguous, it is the union's duty 'to clarify that ambiguity or suffer whatever consequences might attach to the employees' possible interpretations of the ambiguity.' *Crane Co.*, 225 NLRB 657, 659 (1976). *See Inland Shoe Mfg. Co.*, 211 NLRB 724 (1974). It is apparent that the Petitioner here did not clarify its offer to waive the initiation fee.

[App. B, *infra*, pp. 24a-25a].[1]

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[1] Board Member Hunter also disagreed with Chairman Dotson's view that the Company's interpretation of the Union's statement

As the only means available of contesting Board certification of the Union and for other reasons unrelated to this petition, the Company refused to recognize and bargain with the Teamsters. The Union then filed unfair labor practice charges against the Company under sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1), (5); an administrative law judge sustained those charges after a hearing on the non-*Savair* issues. [App. D, *infra*, pp. 33a-39a]. A panel of the Board adopted the administrative law judge's recommended order without opinion. [App. D, *infra*, pp. 31a-32a].

A divided panel of the Third Circuit voted to enforce the Board's order to bargain, two judges finding that substantial evidence existed to credit the NLRB's section 8(b)[2] determination of an across-the-board waiver that could not affect a voter's "fair and free choice" of a bargaining representative. *Savair*, 414 U.S. at 276-78. Relying exclusively on the language of the Union's letter, the majority reasoned that by virtue of secret ballot elections, the "only plausible interpretation" of the pre-

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was unreasonable in light of the NLRB's publicized secret-ballot procedures:

> In my view, the Chairman's reliance on the Board's secret-ballot procedure necessarily leads to the conclusion that waivers of initiation fees which are conditioned solely on how an employee votes in an election are permissible. Such a conclusion is clearly contrary to *Savair*. Thus, I note that in *Savair* the Court set forth the Board's analysis in *DIT-MCO*, 163 NLRB at 1021-22, that 'it is completely illogical to characterize as improper inducement or coercion' a waiver of initiation fees for those who vote 'yes' when the whole problem can be avoided by voting 'no' and that the Court specifically rejected that analysis as ignoring the realities of the situation. *See* 414 U.S. at 277-278.

[p. 25a].

[2] In its statement of the issue, the Court inadvertently characterized this as an unlawful inducement case under section 8(a) of the Act. [App. A, *infra*, p. 7a].

election offer is that it "was intended [by the Union] to apply to all employees in the bargaining unit" [App. A, *infra*, pp. 11a] and that it could not have induced a reasonable employee to believe that if he voted fo the Union, he would not have to pay an initiation fee [App. A, *infra*, p. 12a].

In a lengthy and well-reasoned dissent, Circuit Judge Garth concluded that the Union's fee waiver was an improper inducement which impermissibly tainted the laboratory conditions essential to a fair and unbiased electoral process [App. A, *infra*, p. 16a]. Reading the Union's inducement as a clear offer to waive initiation fees only for those individuals who voted for representation, Judge Garth reasoned that if under this Court's *Savair* decision a union's offer to waive initiation fees for only those members who sign recognition slips prior to an election impermissibly allows the union to buy endorsements, *a fortiori*, a union's offer to waive initiation fees for only those members who vote for the union is an impermissible bribe that should invalidate the election result. [App. A, *infra*, pp. 18a, 21a].

Furthermore, Judge Garth noted that under Board law and other circuit precedent, even an ambiguous initiation fee waiver offer must be construed against the drafting union. [App. A, *infra*, p. 18a].

Finally, Judge Garth observed that under well-established Board and court precedent, the secret nature of the balloting procedure cannot save a union from the consequences of its unlawful pre-election behavior and has never before had a bearing on whether such activity destroys the laboratory conditions under which a representation election must take place. [App. A, *infra*, pp. 17a-18a].

On April 22, 1987, the Company filed a timely Petition for Rehearing and Petition for Rehearing *In Banc*. The Third Circuit denied that Petition on May 4, 1987. [App. E, *infra*, pp. 40a-41a].

On May 28, 1987, a majority panel of the Third Circuit denied the Company's motion to stay the court's mandate pending the filing of a petition for certiorari; Judge Garth would have granted the motion. [App. H, *infra*, p. 50a].

On June 29, 1987, the Honorable William J. Brennan, Jr. granted the Company's application to recall and stay the mandate of the Third Circuit, pending receipt of briefs from opposing counsel by July 2, 1987. The order granting the application was vacated on July 8, 1987 [App. I, *infra*, p. 52a].

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION CLASHES WITH THE RATIONALE OF THIS COURT'S *SAVAIR* DECISION AND ON VARIOUS ISSUES CONFLICTS WITH DECISIONS BY AS MANY AS FIVE OTHER CIRCUITS

Under the guise of interpreting what they apparently believed was an ambiguous offer to waive initiation fees, the National Labor Relations Board and the Third Circuit here held that no union can commit an unfair labor practice by making a pre-election promise of a post-election benefit because no employee, knowing that his vote will be cast by secret ballot, can believe that the union has offered a *quid pro quo* for a vote. This reliance on the secret ballot process to gauge the lawfulness of union conduct during a representation election marks one of the Board's most radical departures from established court and NLRB precedent. It also emasculates this Court's decisions in *NLRB v. Exchange Parts Co.*, 375 U.S. 407 (1964) and *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973) and their progeny by, in effect, permitting an employer and a union to argue for the first time that any inducement or threat which they make cannot serve as a basis for setting aside an election because no "reasonable" employee, armed with

knowledge about the secrecy of his vote, will believe that the employer or the union promised him a benefit or threatened him with harm. If this Court denies the Company's Petition for a Writ of Certiorari, there will be nothing left of laboratory conditions and—indeed—employee free choice because no union or employer will be held to account for its preelection promises or threats.

Moreover, under the guise of interpretation, the Third Circuit held that the inducement in this case was not an offer to waive initiation fees only for those who voted for representation because the Union could not have intended for employees to construe the offer in such a fashion. As discussed below, this use of a "union intent" test places the Third Circuit in direct conflict with the Fifth and Sixth Circuits, which have held that union intent is irrelevant and should not be taken into account when evaluating the lawfulness of an economic inducement to vote for representation.

In addition, until this case, the Board and at least three other circuit courts have stated consistently that where an offer to waive initiation fees is ambiguous and there has been no effort to clarify the promise, the ambiguity must be construed against the drafting union. Here, at every level of review, at least one person—from Regional Director to Circuit Court judge—found the language, at best, less than clear. Yet, the Board, without explanation, departed from its own policy and sustained the election results. At the very least, and consistent with past practice, it should have held a hearing to investigate how employees actually construed the offer.

The Board and the Third Circuit also ignored this Court's admonition in *Savair* to consider the closeness of the vote when deciding if the challenged statement could have affected the outcome of the election. There can be little doubt why this occurred. In conflict with

four other circuits, the panel majority used a "reasonable doubt" test to assay the validity of the election when it should have used a "tendency-to-influence" test to review the likely effect of the Union's conduct on the employees who voted. As a result, the panel majority resolved all doubts in favor of certification when according to previously well-settled law, it should have resolved such doubts in favor of a new election.

Finally, the Board's reliance on the secret ballot to gauge the lawfulness of union pre-election conduct promises confusion at every level. At this point, it is unclear to what extent the NLRB will apply its new "secret ballot" rationale to other types of economic inducement cases; logically, there should be no impediment to its application across-the-board and certainly unions and employers will attempt to argue that their challenged conduct falls within the new rule. This, in turn, will provide both labor and management with greater opportunity to challenge the legitimacy of election results and ultimately leave workers unsure of their status as unionized or non-unionized employees. Unless this Court resolves the critical issues in this case, there will be neither labor peace nor peace of mind for the Board and the federal courts faced with the explosion of litigation which the decision below is certain to engender.

This case, therefore, is not, as the Solicitor General will argue, a case involving the simple application of facts to well-established law. Indeed, it is not even about a simple error of law committed by one appellate court and likely to have few or no consequences beyond that circuit. Rather, this case is about the upheaval of two decades of well-settled law and the emasculation of this Court's decisions in *Exchange Parts* and *Savair*. Granting this Petition is therefore critical to ensure the integrity of an electoral process which the Board and the Third Circuit no longer seem willing to protect.

A. Certiorari Should Be Granted To Review The Third Circuit's Unwarranted Refusal To Apply The Rationale Of *Savair* To The Realities Of An Election Situation In Which A Union Offered Over 100 Employees A Bribe In Exchange For Their Votes

An election cannot be fair if an employee's choice is not free. *Savair*, 414 U.S. at 278-79. An employee's choice cannot be free if a union promises economic benefits or threatens economic harm in a manner which may cause an employee to cast his ballot for representation not because of his pro-union sympathies but because he wishes to take advantage of the inducement or to avoid imposition of the penalty. *Savair*, 414 U.S. at 281.

Here, there can be no doubt that a reasonable employee might have voted for the Teamsters not because of his support for the Union but because he felt compelled to take advantage of the Union's fee waiver offer. Refusing to recognize this obvious possibility, the Third Circuit and the Board sanctioned conduct which falls well below the "moral standard that governs elections . . . ." *Savair*, 414 U.S. at 280.

To reject the Company's position that under *Savair*, the Teamsters' statement was an unlawful promise to waive initiation fees only for employees who voted for the Union or was, at best, an ambiguous statement which a reasonable employee could construe as an offer available only to a pro-union voter, the panel majority relied exclusively upon the existence of the secret ballot election process. The panel determined that "[n]o reasonable employee would view a vote for Union representation in a secret ballot election as the *quid pro quo* for a waiver of initiation fees."[3] [App. A, *infra*, p. 12a]. It further

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[3] In DIT-MCO, the NLRB made a similar observation, stating that "it is completely illogical to characterize as improper inducement or coercion" a waiver of initiation fees for those who vote "yes" when the whole problem can be avoided by voting "no." In

reasoned that the Union could not have intended for its offer to apply only to those employees who voted for representation because the Union knew that balloting was secret and therefore knew that it could not make good on its promise of reward and threat of penalty [App. A, *infra*, p. 11a]. That reasoning cannot withstand scrutiny under *Savair* and places the Third Circuit in direct conflict with other circuit courts which uniformly have rejected such a "union intent" test to determine if an unlawful inducement or threat has been made.

1. *The Third Circuit's reliance on the secret ballot to cure the ills of pre-election misconduct undermines* Savair *and its progeny by insulating the very conduct which destroys the laboratory conditions needed to guarantee a fair and free election*

Just as employers may not promise or grant pre-election benefits to their employees, *NLRB v. Exchange Parts Co.*, 375 U.S. 407 (1964), unions may not promise or grant economic inducements if that promise or grant is made contingent upon support for the union. *Savair; NLRB v. Whitney Museum of Art*, 636 F.2d 19, 21 (2d Cir. 1980). Consistent with *Savair*, the courts and the Board long have held that a union, like an employer, may not "buy" votes with promises or conferrals of monetary benefits or benefits in kind. *See, e.g., NLRB v. Madisonville Concrete Co.*, 553 F.2d 168 (6th Cir. 1977) (union payment of employee's traffic ticket); *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722 (4th Cir. 1967) (excessive payment to union observer); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (1984) (offering jackets to all voters on election day a material *quid pro quo* for a vote); *Easco Tools, Inc.*, 248 N.L.R.B. 700 (1980) (payment by union of $40 to observers unlawful; where matters of employee free choice not free from doubt, election

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Savair, this Court rejected that analysis because it ignored the realities of the union election process. 414 U.S. at 277.

processes better served by directing a new election); *General Cable Corp.*, 170 N.L.R.B. 1682 (1968) ($5 gift to employees before election, even when not conditioned on outcome of election, was unlawful inducement). Such conduct is proscribed because it interferes with an employee's fundamental right of free choice as guaranteed by the Act, a right to resist as well as embrace union representation under laboratory conditions essential to a fair and unbiased electoral process.

In *Savair*, this Court held that a union may not attempt to influence representation elections by offering to waive initiation fees only for those employees who sign recognition slips before an election. Based on *Savair*, the Board has stated that a union also may not attempt to influence the electoral process by conditioning its offer to waive fees upon how an employee casts his ballot. *See Deming Division, Crane Co.*, 225 N.L.R.B. 657, 659 (1976) (waiver is permissible only where it is unconnected with support for the union before the election and unrelated to a vote in the election); *L.D. McFarland Co.*, 219 N.L.R.B. 575, 576 (1975), *enforced*, 572 F.2d 256 (9th Cir.), *cert. denied*, 439 U.S. 911 (1978) (same).

Where a fee waiver offer is unambiguous and impermissible, the election will be set aside. *Savair*. Where it is ambiguous and arguably impermissible, the offer must be construed against the drafting union. *See, Deming Division*; *Inland Shoe Manufacturing Co., Inc.*, 211 N.L.R.B. 724 (1974); *The Coleman Co., Inc.*, 212 N.L.R.B. 927 (1974).

Here, apparently assuming that the offer was ambiguous and under the guise of determining how an employee would interpret the statement, the Board and the Third Circuit in effect held that whether a pre-election promise to waive initiation fees is ambiguous or not, it can never amount to an unlawful inducement because, by virtue of the Board's secret ballot election process, no employee would believe that the offer was an inducement to vote

for representation. In other words, even if the Union had stated that any employee voting for the Company would have to pay initiation fees and that any employee voting for the Union would not, the "secret ballot" test adopted by the Board and sanctioned by the Third Circuit would render such an outright threat/promise lawful because, by virtue of the secret ballot, no employee could believe this offer was a *quid pro quo* for his vote.

The Board's reliance on the secret ballot to insulate clear as well as ambiguous offers of economic benefit, now approved by the Third Circuit, emasculates this Court's *Savair* decision and its progeny and will alter radically the rules by which the Board and the courts now review union economic inducements to vote for representation. Indeed, there will be nothing left of *Savair* and *Exchange Parts* because each time a union or an employer offers a bribe for a vote, the Board will logically maintain that the inducement is lawful by virtue of the fact that no employee, knowing his vote is secret, would believe that the inducement is really an offer for his vote.

Moreover, the Board would have no basis in logic for limiting application of its secret ballot rationale to economic inducement cases; the concept should apply with equal vigor to union and employer intimidation and violence cases. Quite simply, under Board and Third Circuit analysis, a union or an employer would be able to argue that no reasonable employee could take seriously a threat of future harm for a miscast ballot because he would know that the balloting process is secret and that consequently, the union and employer would never know whether they should punish him for voting for or against representation. Yet, as the dissenting opinion observed below:

> In *Zeigler's Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000 (3d Cir. 1981), this court was faced with a case in which employees were threatened with physical violence if they did not individually vote in favor of the union in the representation election.

> Although the threatened employees undoubtedly cast secret ballots, and their intimidators presumably could not discover whether any one of them had in fact voted for the union, the coercion was nevertheless found to be both palpable and real, and this court set aside the election. *Id.* at 1011.

[App. A, *infra*, p. 17a].

It is all too clear what result the Third Circuit would have reached in *Zeigler's Refuse* had it relied on the secret ballot analysis employed here: the court would have had no choice but to certify the union as the employees' exclusive bargaining representative. Such an inevitable result would signal the death knell of the laboratory conditions standard and, more importantly, employee free choice.

Moreover, the Board's "secret ballot" rationale inevitably will engender mass confusion at the Board level as unions and employers begin to test the perimeters of this new approach to election conduct cases. One can easily envision a time when the Board—faced with the consequences of its own folly—will begin to apply its "secret ballot" rationale selectively and hence, inconsistently. This, in turn, can only promise further confusion in the courts.

2. *By relying on the secret ballot process to conclude that no reasonable employee would view the Union's offer as the* quid pro quo *for a vote, the Third Circuit ignored the very realities of the election process which led this Court to issue its* Savair *decision*

In *Savair*, the late Justice Douglas was keenly aware that courts must be sensitive to "the realities of the situation" as they pertain to the union-organizing and electoral process. 414 U.S. at 277. Such realities do not permit the courts to assume "that unions exercising powers are wholly benign towards their antagonists whether they be nonunion protagonists or the employer." 414 U.S. at 280-81. Thus, in the context of the facts which

brought *Savair* to this Court's attention, it was written:

> The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win.

414 U.S. at 270.

Although the employees at Molded Acoustical Products did not, on the basis of the Union's letter, have to come forward and pledge their allegiance to the Teamsters prior to voting, it flies in the face of reality to suggest, as the Third Circuit suggested, that no reasonable employee could feel compelled to vote for the Teamsters because of its promise to waive fees only for those who voted for representation and its concomitant threat to impose fees on those who did not.

The panel majority's decision ignores "the realities of the situation," *Savair*, 414 U.S. at 277, because it is based on the erroneous premise that an employee may not believe that a union has independent means at its disposal to determine how he or she may have voted.

Unlike employers, unions are free to poll employee preferences prior to the election so long as the polling is noncoercive. *Kusan Manufacturing Co.*, 267 N.L.R.B. 740, 746 (1983), *enforced*, 749 F.2d 362 (6th Cir. 1984); *Springfield Discount, Inc.*, 195 N.L.R.B. 921, *enforced*, 82 L.R.R.M. 2173 (7th Cir. 1972). And, in the past, the Board has tolerated conduct which any reasonable person would find and which courts have found to be coercive. *See, e.g., Ziegler's Refuse Collectors, Inc.*, 639 F.2d 1000 (employees threatened with physical violence if they did not individually vote in favor of the union).

Thus, unlike his experience with an employer, an employee is likely to have many occasions when union officials or fellow workers confront him about his voting preferences. The panel majority therefore ignored the realities of the election situation by concluding that after an election is over, a union—based on its pre-election ability to obtain knowledge about voter sympathy—has

no fair reading of how most employees voted. Surely an employee, having been polled about his preferences before an election, is warranted in believing that the union may know how his ballot and others were cast during the election. This being the case, it would be entirely reasonable and consistent with reality for an employee to believe that the union would act on its promise or threat after the election, even if it did not have at its disposal copies of the actual ballots. Thus, here, an employee reasonably could have believed that the offer to waive initiation fees was contingent upon his vote and that the Union had at its disposal the means to make good on its promise of a bribe or threat of a fee.

3. *The panel majority's opinion adopts the language and rationale of the dissent in* Savair

Third Circuit reliance upon the efficacy of secret ballot elections to cure union misconduct appears to track the approach of the dissent in *Savair* and not the rationale adopted in this Court's majority opinion. In dissent, Justice White—joined by Justices Brennan and Blackmun—observed, among other things, that when analyzing the benefits and costs of union affiliation, an employee knows that the easiest way to avoid imposition of an initiation fee is to vote against the union in a secret ballot election. 414 U.S. at 826-27. In other words, an employee seeking to hedge his bets can render the union's inducement/threat hollow simply by voting "no."

A majority of this Court, however, rejected that approach by stating that it ignored the "realities of the situation." 414 U.S. at 277. First, this Court noted that by permitting the union's fee waiver offer to stand in *Savair*, the Board allowed the union to buy endorsements and thereby paint a false portrait of employee support. *Id.* Second, this Court noted that some employees may have felt compelled morally to carry through on their stated intentions to support the union. *Id.* at 278. Finally, this Court observed that the union's offer was unlawful because it might have induced an employee to sign

a recognition slip and then vote for representation to avoid incurring the wrath of a successful union regime. *Id.* at 280-81.

As noted above, the Union's conduct here implicates similar if not identical problems, problems not ameliorated by the secret ballot process. Although the Teamsters' fee waiver offer did not require the Company's employees to commit themselves to a public pro-union stance prior to the election (as in *Savair*) and thus did not enable the Union to paint a false portait of employee support during the election, the offer was certainly capable of leading reasonable employees to believe that they could take advantage of the offer after the election only if they voted "yes" and that they would face a wrathful union regime if they did not.

4. By using a "union intent" test to determine if the Teamsters' fee waiver offer destroyed the laboratory conditions necessary to ensure a free and fair election, the Third Circuit created a conflict among the circuits

As noted above, the panel majority reasoned that because elections are secret, the "only plausible interpretation of the Union's pre-election offer . . . is that it was *intended* to apply to all employees in the bargaining unit [App. A, *infra*, p. 11a; emphasis added]. In other words, the panel majority concluded that if a union cannot know how an employee actually voted, it cannot intend to lead an employee to believe that after the election he will be rewarded with a waiver or penalized with a fee on the basis of his vote. The court's use of a "union intent" test to determine if the Teamsters destroyed the laboratory conditions of this election places the Third Circuit's decision in direct conflict with decisions by the Fifth and Sixth Circuits.

Other circuits which have considered the lawfulness of union inducements or threats have held that the proper inquiry must focus upon what result the promise or

threat was capable of producing in the minds of employees; accordingly, both the Fifth and the Sixth Circuits have rejected the "union intent" test.

For example, in *NLRB v. Gulf States Canners, Inc.*, 585 F.2d 757 (5th Cir. 1978), the Fifth Circuit refused to enforce an NLRB order requiring an employer to bargain with a Teamsters local which won a Board-supervised election, 21 to 16, after giving two employees approximately thirty dollars worth of gasoline. The employer maintained that such gifts destroyed the laboratory conditions necessary to ensure employee free choice; the Board disagreed, upholding a decision in which the Regional Director required the employer to show that the union intended to influence the outcome of the election. Rejecting this "union intent" test, the Fifth Circuit stated:

> This court has held that union elections should be conducted under laboratory conditions and that an election must be invalidated upon a finding of a substantial breach in those conditions. . . . Unlawful acts will taint an election if those acts interfered with the employees' exercise of free choice to such extent that they materially affected the results of an election. . . .
>
> The intent test is inconsistent with the logic behind these holdings. The effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely, an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will. In determining whether an election should be invalidated, the focus should be on the effects of a particular act on the electorate rather than on the actor's intent.

585 F.2d at 759 (emphasis added; citations omitted); *see also, Gulf Coast Automotive Warehouse Co., Inc., v. NLRB*, 588 F.2d 1096, 1099 (5th Cir. 1979) (where employer alleges *Savair* violations, the issue under consid-

eration is whether the election process was contaminated by the impermissible purchase of support and the proper consideration is the objective interpretation by the employees of the message actually communicated to them by the union); *Polyflex M Co.*, 258 N.L.R.B. 806, 808 (1981) (same); *California State Automobile Association*, 214 N.L.R.B. 223 (1974) (same).

Similarly, in *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (6th Cir. 1975), the Sixth Circuit, relying on this Court's *Savair* decision, denied enforcement of a Board order requiring an employer to bargain with a union which prevailed by a vote of 51 to 46 after over-paying a supervisor and certain employees for attending pre-election hearings. The Regional Director certified the union as the employees' exclusive bargaining representative, finding no evidence to suggest that the union intended to influence the vote. In refusing to enforce the Board's order, the Sixth Circuit stated:

> [I]n our opinion the intent or absence of intent on the part of the Union to influence the employees' votes by the overpayments is not a controlling factor. Whether the conduct of the Union was intended to influence the vote, the actions 'undoubtedly had a tendency to influence the election results.' *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722, 729 (4th Cir. 1967).

512 F.2d at 450.

Indeed, use of the "union intent" test by the Third Circuit in this case even appears to conflict with prior Third Circuit precedent. *See Zeigler's Refuse Collectors*, 639 F.2d at 1005 (the Board and the courts have emphasized that the existence of a coercive atmosphere, regardless of how such an atmosphere came about, is the critical fact upon which the Board should focus); *NLRB v. Clearfield Cheese Co.*, 322 F.2d 89 (3d Cir. 1963) (the inquiry is objective, focusing upon what result the material was capable of producing in the minds of the employees).

The Third Circuit's decision in this case cannot be squared with decisions in the Fifth and Sixth Circuit as they pertain to the critical issue of what test the Board and the courts should apply to determine if a union's words or conduct during an election campaign has compromised an employee's right of free choice. The Third Circuit's decision therefore creates a conflict among the circuits on a frequently recurring issue of substantial public importance and injects confusion into an area of the law that demands certainty.

5. *In apparent conflict with three other circuits and prior Board law, the Third Circuit neglected to construe the ambiguous fee waiver offer against the party who made it*

At least three circuit courts have stated that the Board should invalidate an election when a union's offer to waive initiation fees is ambiguous and reasonably can be interpreted to interfere with employee free choice. *See NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 889 (2d Cir. 1983) (a union violates *Savair* when critical details of its waiver offer are ambiguous);[4] *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891, 893 (9th Cir. 1978) (per curiam) (where a fee waiver is communicated to employees in a confusing fashion and a responsible interpretation of the offer is contrary to the requirements of *Savair*, the election should be set aside);[5] *NLRB v.*

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[4] In *Semco*, there was conflicting testimony about whether the union offered to waive initiation fees only for those employees who joined the union prior to the election or if the offer extended to all employees in the unit. After an evidentiary hearing, the hearing examiner credited the testimony which made the offer unambiguously permissible under *Savair*, 721 F.2d at 890. *Semco* is thus distinguishable on its facts from the case before this Court because here, the Board refused to hold an evidentiary hearing. Nevertheless, the principle of law espoused by the court in *Semco* is valid and should have been followed by the Third Circuit.

[5] In *Aladdin Hotel*, a local Teamsters union promised employees by letter a reduction of initiation fees "for this organizing campaign." 584 F.2d at 892. The Board, petitioning for enforcement

Johnson & Hardin Co., 554 F.2d 275, 276 (6th Cir. 1977) (per curiam) (same).[6] Consistent with these statements, the Board has held—until this case—that *any* ambiguity in a fee waiver offer must be construed against the drafting union. *See Deming Division, Crane Co.*, 225 N.L.R.B. 659 (1976); *Inland Shoe Manufacturing Co., Inc.*, 211 N.L.R.B. at 725; *The Coleman Co., Inc.*, 212 NL.R.B. at 927-28. If the union does not clarify the ambiguity, it must suffer whatever consequences might attach to the employees' possible interpretation of it. *Deming Division*, 225 N.L.R.B. at 725; *Coleman Co.*, 212 N.L.R.B. at 928.

The decisions of the Board and of the Third Circuit in this case stand squarely at the opposite end of the spectrum of cases cited above by construing all ambiguity in favor of the union and thereby tolerating conduct which is destructive of even minimal laboratory conditions.

Here, one need only look at the history of this case to see that the Union's offer was at best ambiguous and that a responsible interpretation of the offer might interfere with employee free choice. The Regional Director found the language "inartfully drafted" [App. C, *infra*, p. 29a]. Board Member Hunter found it susceptible of

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of its bargaining order, interpreted this offer as being available to employees before and after the election and thus in compliance with *Savair*. The Ninth Circuit disagreed, noting that an organizing campaign is generally over once the election is held and that no substantial evidence existed to support the Board's additional contention that the union clarified the terms of the offer at a series of meetings.

[6] Neither the record as described on appeal nor the record as described below at 217 N.L.R.B. 993 (1975) and at 221 N.L.R.B. 379 (1975) identifies the language of the offer which caused the Sixth Circuit to deny enforcement of the Board's bargaining order. It is only clear that by the nature of the offer, employees "easily could have concluded that only those paying $10 and pledging their support to the Union before the election would be entitled to a waiver of initiation fees." 554 F.2d at 276.

two meanings [App. B, *infra*, pp. 24a-25a]. And, Judge Garth was "convinced that the *proper interpretation* . . . is that the fee waiver . . . [was] being offered only to those individuals who vote[d] in favor of the Union" [App. A, *infra*, p. 18a]. Given the fact that the Union's offer can be interpreted to interfere with employee free choice, it was manifest error for the Third Circuit to construe the ambiguity in favor of the drafting party.

The decisions of the Third Circuit and of the Board in this case now create confusion in an area of law once well-settled and, equally significant, promise to generate further confusion as unions begin to test the outer limits of the Board's new relaxed policy toward ambiguously worded fee waiver offers. Instead of encouraging unions to be more exact in the wording of their campaign statements, the Board—and now the Third Circuit—are making ambiguity a virtue and clarity a vice.

The Board's recent decision in *Ida Lace, Inc.*, 275 N.L.R.B. 211 (1985) (Hunter, dissenting) further illustrates the danger of tolerating ambiguity in fee waiver offers. In *Ida Lace*, the union offered employees the following inducement to vote for representation:

> When you VOTE YES on the secret ballot directed by the National Labor Relations Board, on November 2nd, your Union could fulfill this document.
>
> GUARANTEED—The Executive Board approved with the recommendation of the Union president that all workers who have worked during the voting month (November) will not have to pay an initiation fee.

The regional director found that the union offered the waiver to all employees unconditionally and that as a result there was no violation of *Savair*. Two members of the Board agreed; Member Hunter, however, dissented, finding that the union's statement was equally susceptible of being interpreted as an offer to waive the initiation fee only if the individual employee voted for the union

and that employees reasonably could have construed the offer in such a fashion. 275 N.L.R.B. at 211-12. Clearly, the fee waiver offer in this case and the fee waiver offer in *Ida Lace* are but two examples of what the Board and the courts will face with greater frequency as a result of the Board's policy reversal toward ambiguous inducements.

Moreover, the Board provided no reasoned basis for abandoning its prior well-established policy toward ambiguous fee waiver offers. The Board, like all agencies, must adhere to the regulations and decisions that it announces. Although it is free to change its mind on matters of law that are within its competence to determine, it must carefully explain its reasons for doing so. *Local 1384, UAW v. NLRB*, 756 F.2d 482, 492 (7th Cir. 1985); *NLRB v. Haberman Co.*, 641 F.2d 351, 362-63 (5th Cir. 1981); *NLRB v. Campbell Products*, 623 F.2d 876, 880-81 (3d Cir. 1980). It may not simply ignore prior precedent or distinguish them away on meaningless grounds. *NLRB v. West Sand and Gravel Co.*, 612 F.2d 1326, 1333 (1st Cir. 1979) (ambiguous unit description was virtually indistinguishable from ambiguous unit description in prior case; ALJ's attempts to distinguish cases unconvincing).

Here, as noted above, the Regional Director acknowledged that the Union's offer was "inartfully drafted" and then, to avoid the implications of his observation, engaged in a dubious process of interpretation which rendered the offer unconditional. Compounding the error, the Board neither cited prior precedent nor attempted to distinguish this case from its own well-established body of law concerning ambiguously worded fee waiver offers. This Court has never tolerated such conduct from other agencies and should not permit the Third Circuit to create a special exception for the NLRB.[7]

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[7] At the very least, the Board should have held a hearing to determine how the Petitioner's employees actually construed the

If this Court does not correct the Board's newfound tolerance of ambiguity in fee waiver cases by reversing the Third Circuit and ordering a new election, each employee faced with the choice of voting "yes" or "no" in future elections will find it increasingly difficult to know when a union is offering a bribe for his vote. An employer, in turn, will be forced to challenge election results with greater frequency because of this uncertainty, thereby adding to the growing list of cases that must be heard by the Board and by federal appellate courts each year. Moreover, unless this Court resolves the apparent conflict between the Third Circuit approach of construing ambiguity in favor of the drafting union and the Second, Sixth, and Ninth Circuit approach of construing ambiguity against the drafting union, federal courts will be mired in confusion for years to come.

Clearly, the Board's recent tolerance for ambiguity, as sanctioned by the Third Circuit, is inconsistent with the NLRB's mission to ensure that representation elections are conducted under strictly maintained laboratory conditions.

6. Use of a "reasonable doubt" test to assay the validity of the election places the Third Circuit's decision in conflict with four other circuits which use a "tendency-to-influence" test; as a result, the Third Circuit resolved doubts in favor of certification when it should have resolved them in favor of a new election

In reviewing the NLRB's decision under the substantial evidence test, the panel majority, citing *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 68 (3d Cir. 1983) (en

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offer. *See, e.g., NLRB v. Polyflex M Co.*, 622 F.2d 128, 129 (5th Cir. 1980) (post-election hearing is required when objections to election raise substantial and material factual issues). This is especially true when the margin of victory is narrow. *NLRB v. J-Wood*, 720 F.2d 309, 316-17 (3d Cir. 1983).

banc), stated that with respect to matters involving alleged union misconduct, a court "must respect the Board's decision . . . unless 'the manner in which the election was held raises a reasonable doubt as to its validity.'" [App. A, *infra*, p. 7a]. That test, however, applies to alleged Board misconduct, not to alleged union misconduct. When laboratory conditions are threatened by alleged union misconduct, the circuit courts uniformly have stated that "the assay should seke to find whether the question action by an election candidate had a tendency to influence the outcome of the voting." *Gulf States Canners, Inc.*, 585 F.2d at 759 (5th Cir.); *NLRB v. Bristol Spring Manufacturing Co.*, 579 F.2d 704 (2d Cir. 1978); *Plastic Masters, Inc.*, 512 F.2d at 450-51 (6th Cir.); *Collins & Aikman Corp.*, 383 F.2d at 726 (4th Cir.). If the challenged action had a tendency to influence the outcome of the election, the election should be invalidated. *Id.*

The tendency-to-influence test requires an examination of the challenged action in light of all relevant facts. *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 111-12 (8th Cir. 1972). One relevant fact is the closeness of the vote. Thus, where a change of only a few votes would affect the outcome, less egregious action may require a rerun of the election. *Gulf States Canners, Inc.*, 585 F.2d at 759; *Plastic Masters Inc.*, 512 F.2d at 451 (five-vote margin of victory is sufficient to trigger closer scrutiny); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (under all the circumstances, election overturned where 25 jackets given to voters on election day could have affected five-vote margin); *See also, Savair*, 414 U.S. at 281 (closeness of vote should be considered in deciding whether the Board should hold a new election).

If a tendency to influence the outcome can be said to exist, doubts as to whether the conduct actually had an impact should be resolved *against* certification. *Monmouth Medical Center v. NLRB*, 604 F.2d 820, 828 (3d

Cir. 1979) (rejecting Board's standard in a misrepresentation case that union statements "could not reasonably have had an impact" on the outcome of the election).

Here, it is readily apparent that the Third Circuit not only employed the wrong test but went out of its way to resolve all doubts in favor of certification. This was legal error.

Moreover, contrary to this Court's admonition in *Savair*, the majority panel did not even consider the closeness of the vote in deciding if the Board should have invalidated the results. Indeed, there is no evidence of record to suggest that the Board considered this factor. This, too, was legal error.

7. *Denial of Certiorari will only perpetuate confusion*

The International Brotherhood of Teamsters is the largest union in this country. It engages in hundreds if not thousands of organizing drives each year. If the Union's fee waiver offer here is a standard feature in the repertoire of inducements used by the Teamsters or by other unions or if it becomes one by virtue of the Third Circuit's stamp of approval, then every employee across the nation who is faced with the hard choice of accepting or rejecting representation may have to decide if the following 24 words provide a benefit to all employees or merely to those who vote "yes":

> All employees in the bargaining unit will not have to pay the $50.00 initiation fee if they vote for the union to represent them.

Under *Savair* and its progeny no employee should be faced with such a decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 31, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3468 and 86-3561

MOLDED ACOUSTICAL PRODUCTS, INC.,
Petitioner in No. 86-3468
Respondent in No. 86-3561

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

(NLRB No. 4-CA-14794)

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued: March 3, 1987

Before: GIBBONS, *Chief Judge*, and SEITZ and GARTH, *Circuit Judges*

(Opinion Filed: April 8, 1987)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

The National Labor Relations Board (the Board) petitions for enforcement of its order holding that the refusal of the petitioner, Molded Acoustical, Inc. (the Company), to bargain with the respondent, Local 773, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (the Union), violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(a)(1), (5) (1982). In challenging the Board's order, the Company contends: 1) that the election which led to the Union's certification was tainted by a Union promise to waive all initiation fees if the Company's employees elected the Union as their bargaining representative; 2) that the Board improperly refused to conduct an evidentiary hearing to determine the effect that the Union's waiver had on eligible voters; and 3) that the relocation of Company operations subsequent to the election in question constituted changed circumstances sufficient to obviate any obligation to bargain with the Union. Because we find no merit in these contentions, we will enforce the Board's order in its entirety.

I.

On October 26, 1983, the Union filed a petition with the Board, pursuant to section 9 of the NLRA, 29 U.S.C. § 159 (1982), seeking to represent certain employees of the Company. The Company and the Union entered into an election agreement on November 14, 1983, which was approved by the Regional Director of the Board on the next day. The Company and the Union further agreed that the election would be held in the following bargaining unit:

> All full-time and regular part-time production and maintenance employees at the [Company's] Main Street facility, but excluding all other employees, including office and plant clerical employees, professional employees, lead men, confidential employees, guards and supervisors, as defined in the [NLRA].

The election was eventually held on December 30, 1983. At the election, 60 votes were cast in favor of and 55 against union representation.

Eleven days before the election, the Union sent a letter to the employees in the proposed bargaining unit. In that letter, the Union urged these employees to vote for Union representation. In addition, in a postscript, the Union stated:

> All employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract!

After the election, the Company filed objections to it on the ground that the quoted postscript violated the United States Supreme Court's decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). Specifically, the Company contended that this postscript presented an improper inducement for employees to vote for union representation and that it effectively undercut their free choice. The Regional Director, however, rejected the Company's objections. While recognizing that *Savair* prohibits a union from limiting an offer to waive initiation fees solely to those employees who sign union authorization cards before a certification election, the Regional Director opined that this offer to waive fees was clearly not so limited. Accordingly, the Regional Director upheld the validity of the election.

The Company filed exceptions to the Regional Director's report and requested that the Board either order a

new election or hold a hearing for the purpose of taking testimony to resolve disputed factual issues. On December 10, 1984, the Board issued a "Decision and Certification of Representative" adopting the Regional Director's findings and recommendations. In that decision, the Board stated that the Company's interpretation of the challenged postscript—i.e., that only those employees that voted for the Union would qualify for the waiver of initiation fees—was "unreasonable in light of the Board's fully publicized secret-ballot procedure." *Molded Acoustical Products, Inc.*, 273 NLRB 156, 156 n.1 (1984).

After the Board certified the Union, the Company refused to bargain. The Company based its refusal to bargain in part on the movement of its operations from Easton, Pennsylvania to Palmer Township, Pennsylvania —a distance of seven miles. The Company contended that this move led to employee turnover and substantial changes in operations which required reexamination of the Union's status as the employees' legitimate bargaining Representative.[1] Although it was first proposed be-

[1] The extant facts seem to contradict the contention that the Company's old and new plants are dissimilar operations. At both the Easton and the Palmer Township facilities, the Company manufactured fiberglass products for thermal and acoustical applications. Although the specific items produced by the Company are constantly changing, this is only because the needs of the Company's customers are constantly changing. It is significant that the Company did not lose any customers because of the movement of the plant. Furthermore, it is apparent that the work conditions and work force at the Palmer Township plant are essentially the same as those at the Easton facility. The new plant began operations with 37 production and maintenance employees. All 37 of these employees came over from the Company's old facility. By May of 1985 there were 118 production employees at the new plant, at least 100 of which had transferred from the old facility. Those employees continued to perform the same work they had previously performed at the old plant, except that the new facility was a more modernized operation. The wages and benefits of the

fore the Union election of 1983, the Company's movement of operations was completed after the Union had been certified.[2] The Company also based its refusal to bargain on the contention that the Board had improperly declined to order a new election in spite of the Company's previous objections.

On May 6, 1985, a hearing concerning the Company's refusal to bargain with the Union was held before an Administrative Law Judge. The Administrative Law Judge held that the Company's refusal to bargain violated sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5). In so deciding, the Administrative Law Judge determined that the basic operation at the Company's old and new plants remained unchanged and that no unusual circumstances justified its refusal to bargain. Furthermore, he declined to consider the waiver of initiation fee issue inasmuch as that issue had previously been determined in the representation proceedings.

On July 31, 1986, the Board issued a decision adopting the recommended order of the Administrative Law Judge in all respects. The Company's petition to review and the Board's cross-application for enforcement were then filed with this court.

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employees remained unchanged after the move and the labor market from which the employees were drawn remains essentially the same. The working conditions, break areas, and shifts of the employees at the new plant are also the same as they were shortly prior to the closing of the old facility. In addition, the hiring policy and disciplinary procedures were not changed after the move. Finally, the Company's employee manual was applied at both facilities and the manual was not substantially modified prior to or after the move to Palmer Township.

[2] The Company began to move its operations to Palmer Township on October 8, 1984, and the move was completed on March 10, 1985.

II.

The primary issue to be determined is whether the Union's pre-election letter, promising to waive initiation fees if employees opted for Union representation, is an inducement to vote for the Union which violated NLRA sections 8(a)(1) and 8(a)(5), 29 U.S.C. 158(a)(1), (5). The Board determined that this promise by the Union did not so taint the first election as to warrant a second vote. As the reviewing court, we will only reverse the Board's holding if it is not supported by substantial evidence on the record. *Black Grievance Committee v. NLRB*, 749 F.2d 1072, 1074 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2703-04 (1985); *NLRB v. L. & J. Equipment Company, Inc.*, 745 F.2d 224, 231 (3d Cir. 1984); *Medical Center of Beaver County, Inc. v. NLRB*, 716 F.2d 995, 997 (3d Cir. 1983). More specifically, we must respect the Board's decision in this matter unless "the manner in which the election was held raises a reasonable doubt as to its validity." *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 68 (3d Cir. 1983) (en banc) (citing *Polymers, Inc.*, 174 NLRB 282, 283 (1969)).

In *Savair*, 414 U.S. 270, the Supreme Court concluded that a union's offer to waive initiation fees only for those employees who signed union recognition slips prior to a representation election was improper. The Court so decided because such an offer is likely to interfere with employee free choice in two ways. First, by enabling the union to "buy endorsements" from employees, this offer would permit the union to "paint a false portrait of employee support during its election campaign." *Id.* at 277. Second, although the submission of a union recognition slip does not bind an employee to vote for the union, at least some employees who had improperly been persuaded to sign the slips might feel obligated "to carry through on their stated intention to support the union." *Id.* at 277-78. The *Savair* majority did indicate, however, that a union has a legitimate interest in waiving its new

member initiation fee, and that it may do so as long as the waiver applies "not only to those who have signed up with the union before an election but also to those who join after the election." *Id.* at 274 n.4.

Following the *Savair* guidelines, courts have consistently ruled that a union does not endanger employees' freedom of choice if, prior to the representation election, the union promises to waive initiation fees for all employees in the bargaining unit regardless of whether the employees signed union recognition slips prior to election. *See, e.g., NLRB v. First Union Management, Inc.*, 777 F.2d 330, 335 (6th Cir. 1985); *Bokum Resources Corp. v. NLRB*, 655 F.2d 1021, 1024 (10th Cir. 1981); *Vicksburg Hospital, Inc. v. NLRB*, 653 F.2d 1070, 1076 (5th Cir. 1981); *NLRB v. Whitney Museum of American Art*, 636 F.2d 19, 21 (2d Cir. 1980); *NLRB v. Target Stores, Inc.*, 547 F.2d 421, 424 (8th Cir. 1977). In all of these cases, the key to the validity of the union's promise to waive initiation fees was that it was made to all employees without concern for whether they supported the union during any phase of the elective process.

As previously mentioned, the Company challenges the validity of the Union's pre-election letter which stated that "[a]ll employees in the bargaining unit will not have to pay the . . . $50.00 Initiation Fee if they vote for the [union] to represent them." Although the Regional Director admitted that this language is somewhat imprecise, he opined that "it is sufficiently clear that the statement means that the union would waive payment of its initiation fee for all bargaining unit employees, without distinction, if the Union won the Board election and became their collective bargaining representative." The Company contends, however, that this language permits a second distinct and equally plausible interpretation. While apparently conceding that a reasonable reader might assign the same meaning to this language as the Regional Director did, the Company

posits that an equally reasonable reader might conclude that this language affords the waiver of initiation fees only to employees who vote for the Union. Indeed, the Union's desire for an across-the-board waiver of initiation fees would have been more evident had its letter stated that "no employees in the bargaining unit will have to pay the $50.00 initiation fee if the Teamsters are elected to represent them." The Company insists that, because the Union's promised waiver contains this potential ambiguity, the ambiguity should be construed against the Union, *see Coleman Company, Inc.*, 212 NLRB 927, 927-28 (1974),[3] and and should be viewed as

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[3] In *Coleman Company*, the Board discussed its policy that, when considering the validity of union representation elections, all ambiguities in union literature shall be construed against the union. There, the union made a pre-election promise that initiation fees would be waived "for all present employees who make application for charter membership in [the] new local union." In holding that this language improperly interfered with the election, the Board stated:

> In the instant case, the promise of benefit is extended in terms which lack a critical detail. For nowhere in the letter does it appear when the employees to whom it was sent must make their "application for charter membership" in order to be eligible for the waiver . . . . We think that the requirement in the case before us of an *application* for charter membership is at the least equally ambiguous and just as susceptible of an interpretation by the employees that it is to their benefit to make a union commitment before the election, and thereby "come in at the ground floor," to avoid paying the initiation fee. If the letter was not intended to be thus read, it was Petitioner's duty, as explained in Inland Shoe Manufacturing Co., Inc., [211 NLRB 724 (1974)] "to clarify that ambiguity or suffer whatever consequences might attach to employees' possible interpretations of the ambiguity."

212 NLRB at 927-28.

The Company notes that this court has stated that "[the Board] is bound to adhere to the policy it announces, until such time as the policy is modified or abandoned." NLRB v. Campbell Products Dept., 623 F.2d 876, 881 (3d Cir. 1980) (citations omitted). Accordingly, the Company contends that the Board erred because,

improperly and irreparably tainting the initial representation election.

The Company's contention cannot be accepted. Because the ballots in a union election are kept secret even after the vote is tallied, the Union will never be able to determine which employees actually voted for union representation.[4] Although it is true that a company can chal-

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contrary to its own policy, it failed to construe the instant ambiguity against the Union.

We reject the Company's analysis for two reasons. First, we note that, with regard to the waiver of initiation fees, the union in *Coleman* required employees to take pro-union action prior to the election, while the Union in the instant case did not. Second, we simply do not believe that the language of the pre-election letter in *Coleman*—with its references to "charter membership"—is as clear as the letter given to the employees in this case. Indeed, for reasons that will be discussed *infra*, the only plausible interpretation that can be given to the letter now in question is the one afforded by the Regional Director. Hence, the policy announced in *Coleman* does not compel us to decide this case in the Company's favor.

[4] The Company contends that the Board's holding in Deming Division, Crane Company, 225 NLRB 657 (1976), requires that we reverse the Board's determination in this case. In *Deming*, the union made a pre-election announcement to employees in the proposed bargaining unit that "[t]here will be no initiation fee for anyone joining now during this campaign." *Id.* at 659. In deciding that this language constituted an impermissible interference with the election process, the Board stated:

> [A] waiver [of fees] is permissible only where it is unconnected with support for the union before the election, unrelated to a vote in the election, and with support for the union before the election, unrelated to a vote in the election and without distinction between joining the union before or after the election.

Id.

The situation presented in *Deming* clearly differs from the instant situation. In that case, the union's pre-election announcement explicitly conditioned the waiver of initiation fees on an employee's showing of union support *during an election campaign*—a clear violation of *Savair*, 414 U.S. at 277-78. The proposed fee

lenge specific ballots cast in an election, thereby ascertaining how those employees voted, such challenges are strictly limited and may not be indiscriminate. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331-32 (1946).[5] Clearly, the Company would not be permitted to challenge all of the ballots in an election for the purpose of identifying all of the employees who voted for union representation. This being so, it would be highly illogical to assign the meaning to the Union's pre-election letter that the Company now urges. Certainly, the Union, being fully aware that it could never ascertain all of the employees who voted for it in the election, would not propose to deny certain employees the promised fee waiver because they did not vote for Union representation. Hence, the only plausible interpretation of the Union's pre-election offer to waive initiation fees is that it was intended to apply to all employees in the bargaining unit. That being the case, this waiver did not so flaw the original election as to warrant a new election under *Savair*.

We are similarly unimpressed with the argument that, although the Union's proposed fee waiver must logically apply to all employees in the bargaining unit, the fact that employees might misinterpret the scope of this waiver is *per se* enough to invalidate this election. The contention is that employees faced with a perceived, albeit nonexistent, possibility that they may forfeit the

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waiver in the instant case does not require pro-union activity on the part of employees prior to the representation election; hence, this waiver is permissible under *Savair* and related cases.

[5] The Company challenged the ballots of eight employees in the initial election: four on the ground that they were cast by people no longer employed by the Company and not likely to be recalled; two because they were cast by people whose names were not on the voter eligibility list; and two on the ground that they were cast by employees who are supervisors within the meaning of the NLRA. It is evident that these challenges had nothing to do with the effect of the Union's offer to waive initiation fees on the election.

fee waiver if they do not vote for the Union, may improperly feel compelled to vote for Union representation. We reject this argument for two reasons. First, we believe that such an argument greatly exaggerates the extent to which unions and employers must maintain "laboratory conditions" prior to a representation election. Indeed, as previously pointed out *Savair* expressly recognized that pre-election promises by a union to waive initiation fees do not impermissibly affect a union election as long as the waiver is extended to all employees in the bargaining unit. 414 U.S. at 274 n.4. Second, we do not choose to ascribe the level of ignorance to employees that acceptance of this argument would necessarily require. No reasonable employee would view a vote for Union representation in a secret ballot election as the *quid pro quo* for a waiver of initiation fees. Therefore, we hold that the Union's fee waiver did not impermissibly undercut employee free choice concerning Union representation.

There being substantial evidence on the record to support the Board's decision that the Union's pre-election fee waiver was proper, we proceed to the Company's other claim.

III.

The Company contends that the district court should have conducted a hearing to investigate the effect that the Union's fee waiver offer had on eligible voters. As we held in *ARA Services*, 717 F.2d at 67, the refusal to conduct a hearing regarding election challenges shall only be reversed if such refusal constitutes an abuse of discretion. Based upon our examination of the record, we find no such abuse here.

It is well-settled that the impact of a pre-election inducement such as the Union's fee waiver offer is to be determined by an objective analysis of its words and their context. *See NLRB v. Clearfield Cheese Co.*, 322 F.2d 89, 93-94 (3d Cir. 1963). Certainly, based on the avail-

able objective evidence, the Board's instant determination—that the Union's fee waiver did not improperly affect the unit employees' choice regarding a bargaining representative—was not unreasonable. Indeed, as previously noted, given the fact representation elections are secret, no reasonable employee would vote for the Union out of fear of being denied the initiation fee waiver. Nevertheless, the Company urges that we cannot ascertain the true effect of the Union's fee waiver offer without eliciting the actual reactions of employees in the bargaining unit. This court and other courts have regularly refused, however, to order evidentiary hearings to permit unit employees to testify concerning their subjective reactions to conduct that allegedly impaired a fair election. *See, e.g., Harlan No. 4 Coal Co. v. NLRB*, 490 F.2d 117, 122-23 (6th Cir.), *cert. denied*, 416 U.S. 986 (1974); *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 1063 (D.C. Cir. 1971); *Clearfield Cheese*, 332 F.2d at 93-94. Any such inquiry regarding an employee's subjective understanding of campaign statements leads inevitably to questions about how that understanding affected his vote. As this court has observed in analogous situations, such questions are "destructive of the purpose of the secret ballot and creative of the specter of post-election change of mind." *Clearfield Cheese*, 322 F.2d at 94; *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969) (probing an employee's subjective motivation for signing a union authorization card "involv[es] an endless and unreliable inquiry"). Accordingly, we conclude that the Board properly considered all appropriate evidence in deciding that no hearing was required in this instance.

IV.

The Company finally asserts that the transfer of its operations from Easton to Palmer Township constitutes changed circumstances which cast into doubt the Union's ongoing status as bargaining representative for the unit employees. The Board held that the Company's opera-

tions remained substantially unchanged as a result of its relocation. Therefore, the Board concluded that the Union's status as bargaining representative survived the Company's move to Palmer Township. As the reviewing court, we will uphold the Board's determination if it is supported by substantial evidence on the record. *Black Grievance Committee*, 749 F.2d at 1074; *L. & J. Equipment*, 745 F.2d at 231; *Beaver County*, 716 F.2d at 997.

In *Brooks v. NLRB*, 348 U.S. 96, 102-04 (1954), the United States Supreme Court held that, for one year after the date of a Board certification, a certified bargaining representative enjoys a presumption of continuing support from a majority of the employees in the bargaining unit. See also *NLRB v. Paper Manufacturers Co.*, 786 F.2d 163 (3d Cir. 1986). The Company points out, however, that there may be "unusual circumstances" —for example, the dissolution of the bargaining agent, a schism in the agent, or a radical fluctuation in the size of the bargaining unit—which may affect the duty to bargain collectively before the one-year period expires. *See Brooks*, 348 U.S. at 98-99. The Company contends that, in this instance, the transfer of its operations from Easton to Palmer Township constitutes precisely the sort of "unusual circumstances" that obviate its ongoing duty to bargain with the union.

We cannot agree. First of all, the relocation of the Company's operations clearly did not create any of the "unusual circumstances" outlined in the Supreme Court's *Brooks* opinion. *See id.* Since the move was completed, the Union has not undergone dissolution, it has not suffered a schism, and the size of the employer bargaining unit has remained relatively constant. Furthermore, the facts before us indicate that the Company's operations at the Palmer Township plant are virtually identical to its operations at the Easton plant. *See supra* note 1. If the Company were permitted to avoid the Union's certification here, then every time an employer modernized

its facility, the Union would effectively be out the door. Accordingly, we hold that substantial evidence on the record supports the Board's determination with respect to this issue.

V.

Since the Company's objections to certification of the Union are without merit, and since it tends no other legitimate reason for its refusal to bargain, the Board's order of July 31, 1986 will be enforced in full.

GARTH, *Circuit Judge* dissenting:

We have consistently held that certain procedures must be meticulously followed so that no taint infects the laboratory conditions under which an election takes place. *See, e.g., Vitek Electronics, Inc. v. NLRB*, 763 F.2d 561, 571 (3d Cir. 1985); *Season-All Industries, Inc. v. NLRB*, 654 F.2d 932, 940 (3d Cir. 1981); *Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1004 (3d Cir. 1981). Nevertheless, in this case, the majority denigrates the importance of these laboratory conditions in union certification elections, maj. op., typescript at 14-15, in holding that the certification election at Molded Acoustical was neither affected nor flawed by the Union's promise to waive its $50.00 initiation fee only for those employees who *voted for* the Union.

Because I am convinced that this improper inducement impermissibly tainted the laboratory conditions that are essential to a fair and unbiased electoral process, I dissent from the majority judgment.

I.

The Board concluded that no reasonable employee would have viewed the fee waiver offer as having been restricted to only those who voted in favor of the Union. Appendix at 223, 235. This conclusion must be accepted if supported by substantial evidence on the record considered as a whole, *Black Grievance Comm. v. NLRB*, 749 F.2d 1072, 1074 (3d Cir. 1984), *cert. den. sub. nom., Philadelpia Electric Co. v. Black Grievance Comm.*, 472 U.S. 1008 (1985). However, the record as a whole is completely barren of evidence that would support the Board's conclusion.

The Board urges us to consider the fact that the official election notice stated that the election "will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relation's Board." NLRB Brief at 12. However, we have not been referred to any

portion of the official record in which such a notification appears. Moreover, even if the official election notice were properly before us, it would be of minimal probative value. Such a notice cannot be relied upon to clear up an ambiguity absent some affirmative evidence that it was at least read by the voting employees, and more fundamentally, that its import, i.e. that "secret" really means "secret," was indeed understood by the employees.

I also cannot attribute any significance to the majority's argument that the inherent ambiguity of the Union leaflet is somehow undercut by the secret nature of the balloting procedure. In *Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000 (3d Cir. 1981), this court was faced with a case in which employees were threatened with physical violence if they did not individually vote in favor of the union in the representation election. Although the threatened employees undoubtedly cast secret ballots, and their intimidators presumably could not discover whether any one of them had in fact voted for the union, the coercion was nevertheless found to be both palpable and real, and this court set aside the election. *Id.* at 1011.

It is abundantly clear that the record as a whole in this case—the record upon which we are asked to find that the Union leaflet is reasonably susceptible to only the interpretation put forward by the Board—consists of nothing beyond the disputed leaflet itself. Indeed, such a conclusion is contrary to the clear meaning of the passage:

> All employees in the bargaining unit will not have to pay the the $50.00 Initiation Fee *if they vote* for the Teamsters to represent them. Also dues will not be payable until there is a signed contract!

Appendix at 226 (emphasis added). In my view, the language of this passage is both plain and clear: if you vote for the Union, you will not have to pay the initiation fee; if you do not vote for the Union, you will have

to pay the fee. This passage, even when read together with the dubious pronouncement that the election is by secret ballot, cannot constitute substantial evidence in support of the Board's conclusion, as the majority holds that it does.

II.

Although I am convinced that the *proper interpretation* of the above passage is that the fee waiver is being offered only to those individuals who vote in favor of the Union, such a conclusion is well beyond that which is required to invalidate this election. All that need be demonstrated is that the interpretation that I advance be a *plausible interpretation* for an ambiguously phrased offer. The Board has consistently held that *any* ambiguity in an initiation fee waiver offer must be construed against the drafting Union. *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB 724 (1974); *The Coleman Co., Inc.*, 212 NLRB 927 (1974); *Deming Division, Crane Co.*, 225 NLRB 657 (1976); *See also NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 889 (2d Cir. 1983) ("cases following *Savair* hold that waiver offers, the language of which is ambiguous concerning 'critical details' . . . violate *Savair*, notwithstanding how employees may actually construe those offers").[1]

The Board itself virtually conceded the existence of this ambiguity when it noted that the Union's letter "may have been inartfully drafted." Appendix at 223. Regardless of the Board's concession, however, such a conclusion is inescapable.

Because the Union's leaflet statement was at best ambiguous, and because reasonable employees therefore could

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[1] The holding of NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973), is that a Union's offer to waive initiation fees for only those members who sign recognition slips prior to an election impermissibly allow the Union to buy endorsements. *A fortiori*, a Union's offer to waive initiation fees for only those members who vote for the Union, is an impermissible bribe that should invalidate the election result.

have taken the Union's statement to have been an improper inducement to vote in favor of the Union, the election failed to conform to the laboratory conditions that this court has consistently required. *Vitek Electronics, Inc. v. NLRB*, 763 F.2d 561, 571 (3d Cir. 1985) ("extreme care must be taken that the laboratory conditions have not become so tainted that employees may have based their vote not upon conviction, but upon fear or upon any other improperly induced consideration"); *Season-All Industries, Inc. v. NLRB*, 654 F.2d 932, 940 (3d Cir. 1981) ("in establishing and maintaining the 'laboratory conditions' conducive to an election, no conduct disruptive or destructive of the exercise of a voter's free choice can be tolerated"); *Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1004 (3d Cir. 1981) ("a representation election should be 'a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees' ").

The Union's offer unquestionably constitutes an inducement that must invalidate the election result. This election, therefore, should be set aside.

Indeed this case is indistinguishable from other Board decisions setting aside elections because of impermissibly ambiguous fee waiver offers. In *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB 724 (1974), a secret ballot certification election resulted in a Union victory which was contested by the employer. The employer argued that one of the Union's campaign leaflets violated the *Savair* rule. The leaflet stated: "There are no initiation fees for charter members of a new local (and that is what you would be). Monthly dues will start when a contract has been made with the Company." *Id.*

In *Inland Shoe* there was ample evidence that the Union's fee waiver offer was intended to waive fees for all individuals who were employed at the time of the Union's acceptance. A union organizer had properly ex-

plained at an organization meeting that all employees working at the time of the election would be charter members, and that only those hired after the election would be subject to the initiation fee. Additionally, the Union's bylaws required that waiver of initiation fees must apply to all persons who were employees on the date of election. The Board found, however, that the leaflet was ambiguous; some employees may have believed that the initiation fee would be waived only for those signing authorization cards before the election was held. "We find that employees who read Petitioner's leaflet could reasonably have concluded that it was to their benefit to join Petitioner before the election." 211 NLRB at 725.

In *Inland Shoe*, the testimony of the witnesses concerning the Union's bylaws and representations at an organizational meeting were not sufficient to eliminate the possibility that some employees may have been misled by the leaflet, and the Board set aside the election. In the instant case, where the record is completely barren of evidence that would serve to clear up the ambiguity in the Union's leaflet, we are required to do no less.[2]

The majority's attempt to distinguish *Deming Division, Crane Co.*, 225 NLRB 657 (1976) is similarly unsuccessful. The majority argues that the *Deming Division* holding is limited to condemning improper pro-union support which occurs prior to the representation election. Maj. Op., typescript at 13 n.4. Such a distinction fails not only by its own logic, but also under the explicit holding of the case. First, if it is impermissible to attempt to influence an election through the use of pressure to garner sufficient union authorization cards pre-election,

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[2] It is important to note that the result of this election would have been changed by a swing of only three votes. Appendix at 222. This court should be particularly scrupulous in insuring that fair conditions surrounded a closely contested election. *See Savair*, 414 U.S. at 278 (noting that a swing of only one vote in that election would have changed the result).

It is *a fortiorii* impermissible to attempt to improperly influence the more important certification election for which the authorization cards are but a precursor. Moreover, as stated in the passage from the case that the majority itself quotes. *Deming Division* held that a waiver of fees is impermissible not only when it is connected to support for the union before the election [as in the signing of union authorization cards] but also when it is *related to a vote in the election.* Maj. Op., typescript at 13 n.4 (quoting *Deming Division*, 225 NLRB at 659).

"The Board and the courts have emphasized that the existence of a coercive atmosphere, regardless of how such an atmosphere came about, is the critical fact upon which the Board should focus in determining whether a fair and free election was impossible." *Zeiglers Refuse*, 639 F.2d at 1005. Here, I am forced to conclude that the eligible voters were presented with an improper inducement to vote in favor of the Union. I must therefore dissent from the majority's opinion and judgment in this matter. I would grant Molded Acoustical's petition for review, order the December 30, 1983 election set aside, and deny the Board's cross petition for enforcement.[3]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[3] In light of the fact that I would hold the certification election invalid, I do not find it necessary to address the other claims made by the company.

APPENDIX B

273 NLRB No. 21

D—2428
West Easton, PA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 4-RC-15481

MOLDED ACOUSTICAL PRODUCTS, INC.

and

TEAMSTERS LOCAL 773, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to an election held 30 December 1983 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 60 for and 55 against the Petitioner, with 8 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations,[1] and finds that a certification of representative should be issued.

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[1] Chairman Dotson emphasizes that the interpretation urged by the Employer of the Union's statement that "All employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters"—i.e., that only those employees who voted for the Union would qualify for the waiver—is unreasonable in light of the Board's fully publicized secret-ballot procedure.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 773, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees of the Employer at its 110 Main Street, West Easton, Pennsylvania facility; BUT EXCLUDING all other employees of the Employer, including office and plant clerical employees, professional employees, leadmen, confidential employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. 10 December 1984

DONALD L. DOTSON, Chairman

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER HUNTER, dissenting.

Contrary to the Regional Director, I find that the Petitioner engaged in objectionable conduct by making an impermissible offer to waive its initiation fee. Accordingly, I would set aside the election.

It is undisputed that the Petitioner, Teamsters Local 773, distributed to the employees a campaign letter, dated 19 December 1983, which stated in pertinent part:

> [A]ll employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract.

The Regional Director found that although the Petitioner's statement "may have been inartfully drafted," it was sufficiently clear that the statement meant that the Petitioner would waive the initiation fee for all unit employees, without distinction, if the Petitioner won the election and became their collective-bargaining representative. He further found that the statement did not require the employees to join the Union or to take any other action before the election as a condition of the offer to waive the initiation fee. The Regional Director concluded that the waiver was offered to all employees unconditionally and that therefore the Petitioner's statement was not violative of *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

Contrary to the Regional Director, I find that the Petitioner's statement in its 19 December 1983 letter with respect to the waiver of the initiation fee is ambiguous on its face. In the Regional Director's view the above statement is to be read as an unconditional offer to waive the initiation fee for all unit employees. However, the Regional Director's interpretation is not the only plausible interpretation. Rather, the statement is equally susceptible of the interpretation that the offer to waive the initiation fee was conditioned on the individual

employee's vote in the election and in my view the employees reasonably could have so construed the statement.[1] Such a waiver offer is impermissible under *Savair*. It is also well established that in circumstances, as here, in which a union's offer to waive initiation fees is ambiguous, it is the union's duty "to clarify that ambiguity or suffer whatever consequences might attach to the employees' possible interpretations of the ambiguity." *Crane Co.*, 225 NLRB 657, 659 (1976). *See Inland Shoe Mfg. Co.*, 211 NLRB 724, 725 (1974). It is apparent that the Petitioner here did not clarify its offer to waive the initiation fee.[2]

Accordingly, I find, contrary to the Regional Director, that the Petitioner's offer to waive its initiation fee was violative of *Savair* and I would sustain the Employer's objection, set aside the election, and direct a second election.

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[1] I cannot agree with Chairman Dotson that this interpretation of the Petitioner's statement is unreasonable in light of the Board's fully publicized secret-ballot procedure. In my view, the Chairman's reliance on the Board's secret-ballot procedure necessarily leads to the conclusion that waivers of initiation fees which are conditioned solely on how an employee votes in an election are permissible. Such a conclusion is clearly contrary to *Savair*. Thus, I note that in *Savair* the Court set forth the Board's analysis in *DIT-MCO*, 163 NLRB at 1021-22, that "it is completely illogical to characterize as improper inducement or coercion" a waiver of initiation fees for those who vote "yes" when the whole problem can be avoided by voting "no," and that the Court specifically rejected that analysis as ignoring the realities of the situation. See 414 U.S. at 277-278.

[2] In this regard, I note that in its brief in opposition to the Employer's exceptions the Petitioner, in arguing that no hearing is warranted in this case, states: "In this case the letter containing the waiver language speaks for itself. There is no dispute as to any issue of material fact because the only material fact is the letter itself."

I therefore dissent from my colleagues' adoption of the Regional Director's report.

Dated, Washington, D.C. 10 December 1984

ROBERT HUNTER, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

Case No. 4-RC-15481

MOLDED ACOUSTICAL PRODUCTS, INC.
Employer

and

TEAMSTERS LOCAL 773, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
Petitioner

REPORT AND RECOMMENDATION ON OBJECTION TO ELECTION AND CHALLENGED BALLOTS

Pursuant to a Stipulation Upon Consent Election approved by the undersigned Regional Director on November 15, 1983, an election by secret ballot was conducted on December 30, 1983, in the unit described in paragraph 12 of the Stipulation. The Tally of Ballots, copies of which were served on the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	130
Void ballots	0
Votes cast for Petitioner	60
Votes cast against participating labor organization	55
Valid votes counted	115
Challenged ballots	8
Valid votes counted plus challenged ballots	123

The challenged ballots are determinative of the results of the election.

On January 5, 1984, the Employer timely filed and served an Objection to Conduct affecting the results of the Election which alleges as follows:

> The Petitioner, Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by and through its agent, Vice president Donald A. Hartzell, informed bargaining unit employees that, "all employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them". This conduct violates the pronouncement of the Supreme Court in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), insofar as it ties the waiver of initiation fees to those who voted for the Petitioner in the Board-conducted election and who otherwise supported the Petitioner.

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, an investigation of the challenged ballots and Objection was conducted under my direction and supervision. During the investigation, each party was afforded the opportunity to present witnesses and other evidence relevant to the issues raised by the challenges and the Objection. The investigation disclosed and the undersigned reports as follows:

OBJECTION

The Employer's objection concerns a postscript on a piece of campaign literature dated December 19, 1983, which the Petitioner distributed to employees prior to the December 30, 1983 election. A copy of the letter is attached hereto as Exhibit A. The post script states, "All employees in the bargaining unit will not have to pay the the (sic) $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract !". The Employer contends that this statement violates the Supreme Court's decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), holding that a union's announcement that it

would waive initiation fees for employees who signed recognition slips prior to the election interfered with the election.

While the Petitioner's December 19, 1983, letter may have been inartfully drafted, it is sufficiently clear that the statement means that the Union would waive payment of its initiation fee for all bargaining unit employees, without distinction, if the Union won the Board election and became their collective bargaining representative. There was no requirement that employees join the Union or take any other action before the election as a condition of the Union's offer to waiver the initiation fee. As the waiver of the initiation fee was offered to all employees unconditionally, I find that the Petitioner did not violate the *Savair* rule. *NLRB v. Savair Manufacturing Corp., supra*; *L.D. McFarland Co.*, 219 NLRB 575 (1975); enforced 572 F.2d 256, (9th Cir. 1978) *cert. denied*, 439 U.S. 911 (1978). Accordingly, I find that the Employer's objection lacks merit.

THE CHALLENGES

The Employer challenged the ballots of *Michael Fiala*, *Dennis Young*, *Edward Wagner*, and *Steven Cope* on the ground that they are no longer employees of the Employer and have no reasonable expectancy of recall in the foreseeable future. The Board Agent challenged the ballots of *Raymond Stein* and *Joseph Schaffer* because their names did not appear on the voter eligibility list. The Petitioner challenged the ballots of *Randy Stafford* and *Lawrence Everitt* on the ground that they are supervisors within the meaning of the Act.

The Petitioner filed an unfair labor practice charge on November 16, 1983, in Case No. 4-CA-14090-1 alleging, *inter alia*, that *Edward Wagner*, *Steven Cope*, and *Raymond Stein* were discharged because of their union activities. On December 15, 1983, the Petitioner filed a charge in Case 4-CA-14090-2 alleging that *Michael Fiala* had been discharged because of his union activities. Based on the evidence obtained in the investigation of

the charges, a determination was made that the discharges of *Wagner, Cope, Stein* and *Fiala* were not unlawful and the charges were dismissed on January 13 and 18, 1984, respectively. Therefore, as *Wagner, Cope, Stein* and *Fiala* were not employees within the meaning of the Act as of the date of the election, I find that they were not eligible voters.

In view of my finding that *Wagner, Cope, Stein* and *Fiala* were ineligible to vote, the ballots of Dennis Young, Joseph Schaffer, Randy Stafford and Lawrence Everitt are no longer determinative of the outcome of the election and it is unnecessary to resolve the challenges to their ballots.

RECOMMENDATION

As I have found that the Employer's Objection lacks merit, I recommend that it be overruled. Having found that Edward Wagner, Steve Cope, Raymond Stein and Michael Fiala are not eligible voters, I recommend that the challenges to their ballots be sustained. As the remaining challenges are no longer determinative, I recommend that an appropriate Certification of Representative be issued.

Dated at Philadelphia, Pennsylvania this 31st day of January, 1984.[1]

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director
For the Fourth Region
National Labor Relations Board

---

[1] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington by February 13, 1984. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections, are not a part of the record unless included in the Regional Director's Report on appended to the request for review, or opposition thereto, which a party submits to the Board.

APPENDIX D

JBS

280 NLRB No. 163

D—3923
Easton, PA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 4-CA-14794

MOLDED ACOUSTICAL PRODUCTS, INC.

and

TEAMSTERS LOCAL 773, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On 17 January 1986 [1] Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

---

[1] The issuance date reflected in the judge's decision is incorrect.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Molded Acoustical Products, Inc., Easton, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 31 July 1986

WILFORD W. JOHANSEN
Member

MARSHALL B. BABSON
Member

JAMES M. STEPHENS
Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

Easton, PA
JD-8-86

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 4-CA-14794

MOLDED ACOUSTICAL PRODUCTS, INC.

and

TEAMSTERS LOCAL 773, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA

David Faye, Esq. and *Joseph Kelly, Esq.*, of Philadelphia, PA, for the General Counsel.

Edward H. Feege, Esq., of Allentown, PA, for the Respondent.

William T. Josem, Esq., of Philadelphia, PA, for the Charging Party.

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge: Teamsters Local 773, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union), filed a charge on 2 January 1985 against Molded Acoustical Products, Inc. (Respondent). On 15 February 1985, the Regional Di-

rector for Region 4 issued a complaint alleging that Respondent has violated Sections 8(a)(1) and (5) of the National Labor Relations Act primarily by Respondent's refusal to bargain with the Union. A hearing on this case was held before this Administrative Law Judge in Bethlehem, Pennsylvania on 6 May 1985. Post-hearing briefs were received from Respondent, General Counsel and the Charging Party on or about 20 June 1985.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following findings and conclusions on the issues involved in this proceeding:

FINDINGS OF FACT

I. The Business of the Respondent

The Respondent, a Pennsylvania corporation, with its principal office located at 1 Danforth Drive, Easton, Pennsylvania, is engaged in the molding of fiberglass products for thermal and accoustical applications. During the past year Respondent has purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The Charging Party, Teamsters Local 773, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The complaint alleges that since on or about 17 December 1984, Respondent has failed and refused to rec-

ognize the Union and to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit. The National Labor Relations Board, on 10 December 1984, certified the Union as the exclusive bargaining representative of the employees in the following described unit:

> All full-time and regular part-time production and maintenance employees at the Main Street facility, but excluding all other employees, including office and plant clerical employees, professional employees, leadmen, confidential employees, Guards and supervisors, as defined in the Act.

In its pleadings, Respondent alleges that it has opened a new facility at 1 Danforth Drive, Easton, Pennsylvania (the new plant), and was in the process of closing its facility located at 110 Main Street, West Easton, Pennsylvania (the old plant), at the time of certification. Respondent asserts that the certification issued by the Board on 10 December 1984 was unlawfully issued because the Union had engaged in objectional conduct prior to the election resulting in certification. Further, Respondent alleges that the Regional Director failed to conduct an investigation into Respondent's objection to the conduct affecting the election and its impact on the eligible voters. The Board has finally ruled against Respondent on these matters in its decision in *Molded Acoustical Products, Inc.*, 273 NLRB No. 21 (1984), and accordingly, Respondent's assertions in these regards will not be further considered.

* * * *

Based on the foregoing findings of fact, conclusions of law and the entire record in this proceeding, I find that Respondent has violated Sections 8(a)(1) and (5) of the Act by failing and refusing to recognize the Union and to bargain with the Union as the exclusive representatives of the employees in the appropriate unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

2. Teamsters Local 773, affiliated with, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees employed by Respondent at its Easton, Pennsylvania facility constitutes a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. Since 10 December 1984, the above named labor organization has been, and is now, the certified exclusive representative of all employees in the foregoing unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since 10 December 1984, by refusing to recognize the involved labor organization as the exclusive representative of all employees in the appropriate unit and by failing and refusing to bargain with the labor organization in good faith, Respondent violated Sections 8(a)(1) and (5) of the Act.

The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

Remedy

Having found that Respondent violated Sections 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

As I have found that Respondent violated its obligation under the Act by refusing to recognize the Union as the

exclusive representative of all the employees in the appropriate unit, and further, Respondent has failed to bargain in good faith with the Union over the terms and conditions of employment with respect to the appropriate unit, I shall recommend that Respondent be ordered to recognize the Union as the exclusive representative of all employees in the appropriate unit and, upon request, bargain in good faith with the Union as the exclusive representative of the employees in the unit and, if an understanding is reached, to embody such understanding in a signed agreement. Further, the initial period for certification will be extended to begin on the date Respondent commences to bargain in good faith with the Union. The extension of the certification is required to ensure that unit employees will be accorded the services of their selected bargaining representative for the period provided by law. I shall also order that appropriate notices be posted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [1]

ORDER

The Respondent, Molded Acoustical Products, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize Teamsters Local 773, affiliated with, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of all the employees in the appropriate collective-bargaining unit consisting of all

---

[1] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

full-time and regular part-time production and maintenance employees at its Easton, Pennsylvania facility.

(b) Refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the above described unit.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately recognize that the Union is the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

(b) Upon written request from the Union, bargain in good faith with the Union over the terms and conditions of emplyoment of the employees in the appropriate-described bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Easton, Pennsylvania place of business copies of the attached notice marked "Appendix." [2] Copies of said notices, on forms provided by the Regional Director for Region 4 after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

---

[2] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

posted. Reasonal steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., January 17, 1985.

/s/ Wallace H. Nations
WALLACE H. NATIONS
Administrative Law Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 86-3468 and 86-3561

MOLDED ACOUSTICAL PRODUCTS, INC.,
Petitioner in No. 86-3468
Respondent in No. 86-3561

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and GARTH, *Circuit Judges*

The petition for rehearing filed by Molded Acoustical Products, Inc. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons
Chief Judge

Dated: May 4, 1987

APPENDIX F

TEAMSTERS LOCAL 773

[EMBLEM]

1345 Hamilton Street
Allentown, Pennsylvania 18102
Telephone 215 434-4451

THE FULL SERVICE UNION

December 19, 1983

Dear Employee of Molded Acoustical Products:

On December 30, 1983 between the hours of 8:00 a.m. to 9:30 a.m. and 4:30 p.m. to 5:30 p.m., you will make one of the most important decisions of your working life.

You will make a choice as to whether you elect to have a Teamsters Union represent you or whether you will rely on your *Employer* at *Molded Acoustical Products* to give you a fair shake.

Only a first class Union can get you a first class contract.

The Teamsters Union can provide you with a first class contract and able to back it up with first class representation.

A Teamsters Union Contract safeguards and protects the rights of a worker at his work place. The main value and purpose of a *Teamsters* Union Labor Contract is *Protection.*

The Teamsters Union is *UNITED, POWERFUL,* AND *EFFECTIVE.*

VOTING WILL TAKE PLACE ON THE SECOND FLOOR IN THE LUNCH ROOM AT YOUR PLACE OF EMPLOYMENT, ON DECEMBER 30, 1983.

Make sure your vote on December 30, 1983 means *JOB SECURITY!*

VOTE TEAMSTERS!!!!!

Sincerely,

Donald A. Hartzell
V.P. Organizer LU #773

DAH:am

P.S.: All employees in the bargaining unit will not have to pay the the $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract!

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 4-RC-15481

MOLDED ACOUSTICAL PRODUCTS, INC.,
Employer

and

TEAMSTERS LOCAL 773, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

EMPLOYER'S EXCEPTIONS TO REGIONAL DIRECTOR'S REPORT AND RECOMMENDATIONS ON OBJECTION TO ELECTION AND CHALLENGED BALLOT PURSUANT TO SECTION 102.69 OF THE RULES AND REGULATIONS

AND NOW, this 16th day of February 1984, the Employer, Molded Acoustical Products, Inc., files the following Exceptions to the Report and Recommendations on Objection to Election and Challenged Ballots of the Regional Director, Fourth Region, dated January 31, 1984, and in support of said Exceptions states as follows:

1. On December 30, 1983, pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director on November 15, 1983, an election by secret ballot was conducted in the unit described in Paragraph 12 of said Stipulation.

2. After said election, a Tally of Ballots was served upon the parties by the Regional Director which showed the following results:

Approximate number of eligible voters	130
Void ballots	0
Votes cast for Petitioner	60
Votes cast against participating labor organization	55
Valid votes counted	115
Challenged ballots	8
Valid votes counted plus challenged ballots	123

3. On January 4, 1984, the Employer filed and served Objections to the Conduct Affecting Election which alleged as follows:

> (1) The Petitioner, Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by and through its agent, Vice President Donald A. Hartzell, informed bargaining unit employees that, "All employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them." This conduct violates the pronouncement of the Supreme Court in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), insofar as it ties the waiver of initiation fees to those who voted for the Petitioner in the Board-conducted election and who otherwise supported the Petitioner. A true and correct copy of the December 19, 1983 letter to Employees of Molded Acoustical Products from Petitioner is attached hereto as Exhibit A and made a part hereof.

4. In support of said Objections, the Employer submitted a legal memorandum and requested a full investigation, but no investigation or hearing occurred, and the next communication with the Regional Office was not until such time as the Regional Director on January 31, 1984 issued a Report and Recommendation on Objection to Election and Challenged Ballots.

5. On January 31, 1984, the Regional Director issued a Report and Recommendation on Objection to Election

and Challenged Ballots in which, *inter alia*, he made the following Recommendation:

> The Employer's objection concerns a postscript on a piece of campaign literature dated December 19, 1983, which the Petitioner distributed to employees prior to the December 30, 1983 election. A copy of the letter is attached hereto as Exhibit A. The post script states, "All employees in the bargaining unit will not have to pay the the (sic) $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract!". The Employer contends that this statement violates the Supreme Court's decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), holding that a union's announcement that it would waive initiation fees for employees who signed recognition slips prior to the election interfered with the election.
>
> While the Petitioner's December 19, 1983 letter may have been inartfully drafted, it is sufficiently clear that the statement means that the Union would waive payment of its initiation fee for all bargaining unit employees, without distinction, if the Union won the Board election and became their collective bargaining representative. There was no requirement that employees join the Union or take any other action before the election as a condition of the Union's offer to waiver the initiation fee. As the waiver of the initiation fee was offered to all employees unconditionally, I find that the Petitioner did not violate the *Savair* rule. *NLRB v. Savair Manufacturing Corp., supra*; *L.D. McFarland Co.*, 219 NLRB 575 (1975); enforced 572 F.2d 256, (9th Cir. 1978) *cert. denied*, 439 U.S. 911 (1978). Accordingly, I find that the Employer's objection lacks merit.

6. Pursuant to Section 102.69 of the Rules and Regulations of the NLRB, the Employer takes exception to the Regional Director's Report and Recommendations with respect to his findings that its Objection lacks merit and recommending that it be dismissed and that an appropriate Certification of Representative issue for the following reasons:

(1) The Regional Director misapplied the decision of the Supreme Court in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), and in so doing sanctioned Petitioner's communication to eligible voters that initiation fees would be waived for those employees who voted for the Petitioner to represent them. This communication relating the waiver of initiation fees with the vote in the upcoming election violates the *Savair* rule as it has been applied by the Board. *Deming Division, Crane Co.*, 255 NLRB 657 (1976).

(2) The Regional Director while acknowledging the "inartful drafting" of said communication to employees wrongfully failed and refused to construe the same against Petitioner responsible for its draftsmanship, and in so doing, contravened established Board policy. *Coleman Company, Inc.*, 212 NLRB 927 (1974); *Deming Division, Crane Co., supra.*

(3) The Regional Director failed to conduct an investigation into the Objection to the Conduct Affecting Election and its impact on eligible voters.

WHEREFORE, for the reasons set forth above, the Employer requests the National Labor Relations Board to reject the Report and Recommendations on Objection to Election and Challenged Ballots issued by the Regional Director and that the Board order the results of the election be set aside and a new election ordered, or, in the alternative, that a hearing be ordered by the Board for the purpose of taking testimony to resolve the factual

issues presented by the Employer's Objection set forth above.

Respectfully submitted,

HAYES and FEEGE, P.C.

By: /s/ Edward H. Feege
EDWARD H. FEEGE

By: /s/ Larry J. Rappoport/F
LARRY J. RAPPOPORT
Attorneys for the Employer,
Molded Acoustical Products, Inc.

Of Counsel:

HAYES and FEEGE, P.C.
851 W. Emaus Avenue
Allentown, PA 18103
(215) 791-3833

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Employer's Exceptions To Regional Director's Report And Recommendations On Objection To Election And Challenged Ballot Pursuant To Section 102.69 Of The Rules And Regulations was served upon the following by mailing same, first-class mail, postage prepaid, this 16th day of February 1984:

MR. PETER W. HIRSCH, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION FOUR
One Independence Mall—Seventh Floor
615 Chestnut Street
Philadelphia, PA 19106

WILLIAM T. JOSEM, ESQUIRE
MARKOWITZ & RICHMAN
1100 North American Building
121 South Broad Street
Philadelphia, PA 19107

/s/ Larry J. Rappoport/F
LARRY J. RAPPOPORT

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3468 and 86-3561

MOLDED ACOUSTICAL PRODUCTS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Before: GIBBONS, *Chief Judge*, SEITZ and GARTH, *Circuit Judges*

The motion for a stay of mandate pending the filing of a petition for certiorari is denied. Judge Garth would grant the motion.

By the Court

/s/ John J. Gibbons
Chief Judge

Dated: May 28, 1987

On consideration whereof, it is now here ordered and adjudged by this Court that the Petition for Review be, and the same is hereby is denied and the Cross-Application for Enforcement is granted. It is further ordered and adjudged that the order of the said Board dated July 31, 1986, be, and the same is enforeced in full. Costs taxed against Molded Acoustical Products, Inc., petitioners in No. 86-3468 and respondent in No. 86-3561.

ATTEST:

/s/ Sally Mrvos
Clerk

April 8, 1987

Certified as a true copy and reissued in lieu of a formal mandate on July 13, 1987.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk
U.S. Court of Appeals
for the Third Circuit

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-5

MOLDED ACOUSTICAL PRODUCTS, INC.,
Applicant,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the applicant, and the memorandum filed by the Solicitor General, on behalf of the National Labor Relations Board in opposition thereto,

IT IS ORDERED that the temporary stay heretofore issued by the undersigned on June 29, 1987, be, and the same is hereby, vacated and the application for recall and stay is, in all respects, denied.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of July, 1987.

Supreme Court, U.S.
FILED
OCT 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-186

In the Supreme Court of the United States

OCTOBER TERM, 1987

MOLDED ACOUSTICAL PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that the union's pre-election offer to waive initiation fees did not interfere with the election process on the ground that the offer extended to all employees, not just those employees who voted for the union.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-186

MOLDED ACOUSTICAL PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 815 F.2d 934. The decision and order of the National Labor Relations Board (Pet. App. 31a-32a) and the decision of the administrative law judge are reported at 280 N.L.R.B. No. 163. The Board's prior decision and certification of representative (Pet. App. 22a-26a) are reported at 273 N.L.R.B. 156. The Regional Director's report and recommendation on objections to election (Pet. App. 27a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1987. A petition for rehearing was denied on May

4, 1987 (Pet. App. 40a-41a).[1] The petition for a writ of certiorari was filed on July 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1983, petitioner and Local 773, International Brotherhood of Teamsters, Warehousemen and Helpers of America (the Union), agreed that a union representation election would be held among a stipulated group of petitioner's employees (Pet. App. 3a). Eleven days before the election, the Union sent a letter to the employees in the stipulated unit urging them to vote for union representation. A postscript to the letter stated (*id.* at 4a):

> All employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract[.]

The election was held on December 30, 1983; 60 votes were cast in favor of Union representation and 55 against (*ibid.*).

Invoking this Court's decision in *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), petitioner objected to the election on the ground that the postscript in the Union's letter improperly induced the employees to vote for union representation. The regional director of the National Labor Relations Board found that petitioner's objection lacked merit. See Pet. App. 28a-29a. The regional director acknowledged that this Court held in *Savair Manufacturing* that "a union's announcement that it would waive initiation fees for employees who signed recognition slips prior to the election" constitutes im-

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[1] On July 8, 1987, Justice Brennan denied petitioner's application to this Court for recall and stay of the mandate of the court of appeals (Pet. App. 52a).

proper interference with the election (Pet. App. 28a-29a). He concluded, however (*id. at 29a*), that while the Union's letter

> may have been inartfully drafted, it is sufficiently clear that the statement means that the Union would waive payment of its initiation fee for all bargaining unit employees, without distinction, if the Union won the Board election and became their collective bargaining representative. There was no requirement that employees join the Union or take other action before the election as a condition of the Union's offer to waive the initiation fee.

Because "the waiver of the initiation fee was offered to all employees unconditionally," the regional director concluded that the Union did not violate the *Savair Manufacturing* rule (Pet. App. 29a).

Petitioner filed exceptions to the regional director's determination, but the Board upheld that determination by a divided vote, certifying the Union as the exclusive representative of petitioner's bargaining unit employees. See Pet. App. 22a-26a. The Board "adopted the Regional Director's findings and recommendations" (*id.* at 22a (footnote omitted)). Chairman Dotson added that petitioner's interpretation of the Union's statement—that the initiation fee waiver extended only to employees who voted for the Union—was "unreasonable in light of the Board's fully publicized secret ballot procedure" (*ibid.*).[2]

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[2] The election notices that the Board requires to be posted at a place of employment (see 29 C.F.R. 101.19(a)(1)) state: "The election will be by SECRET ballot under the supervision of the Regional Director of National Labor Relations Board." The notice further advises the voter: "Mark your ballot in secret in the voting booth provided; DO NOT SIGN YOUR BALLOT." "Fold the ballot before leaving the voting booth, then personally deposit it in the ballot box under the supervision of an agent of the Board." See Form NLRB-707.

Member Hunter dissented. He concluded that the Union's statement was ambiguous because it was "equally susceptible of the interpretation that the offer to waive the initiation fee was conditioned on the individual employee's vote in the election" (Pet. App. 24a-25a). Member Hunter would have set aside the results of the election and ordered a second election.

Following the certification of the Union, petitioner refused to bargain with the Union. The Board found that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), and issued an order directing petitioner to bargain with the Union upon request. Pet. App. 5a, 6a.

2. The court of appeals, by a divided vote, upheld the Board's findings and enforced the bargaining order. See Pet. App. 3a-21a. The court stated that this Court's decision in *Savair Manufacturing* established the rule that a union may not offer to waive initiation fees only for those employees who sign union recognition slips prior to a representation election. However, "a union has a legitimate interest in waiving its new member initiation fee, and * * * it may do so as long as the waiver applies 'not only to those who have signed up with the union before an election but also to those who join after the election.' " *Id.* at 7a-8a, quoting *Savair Manufacturing,* 414 U.S. at 274 n.4. The court of appeals held that the Board reasonably concluded that the Union's offer here fell in the permissible category. Pet. App. 12a.

The court of appeals acknowledged the Board rule that "ambiguities" in union literature are to be construed against the union (Pet. App. 9a-10a n.3). It concluded that the Union's statement here was not ambiguous. The court stated that "the only plausible interpretation of the Union's pre-election offer to waive initiation fees is that it was intended to apply to all employees in the bargaining unit." *Id.* at 11a; see also *id.* at 10a n.3. The court ex-

plained that "[b]ecause the ballots in a Union election are kept secret even after the vote is tallied, the Union will never be able to determine which employees actually voted for Union representation" (*id.* at 10a (footnote omitted)). In these circumstances, the court said "it would be highly illogical" to interpret the Union's pre-election letter as a proposal "to deny certain employees the promised fee waiver because they did not vote for union representation" (*id.* at 11a). The court rejected the argument that an employee might misinterpret the scope of the initiation fee waiver: "we do not choose to ascribe the level of ignorance to employees that acceptance of this argument would necessarily require. No reasonable employee would view a vote for union representation in a secret ballot election as the *quid pro quo* for a waiver of initiation fees" (*id.* at 12a).

Judge Garth dissented (see Pet. App. 16a-21a). In his view, the Union's statement could reasonably be interpreted as limiting the fee waiver to those employees who voted for the Union. Invoking the Board's rule that ambiguous statements should be construed against the maker, he interpreted the Union's statement here as an impermissible offer to waive initiation fees only for Union supporters.[3]

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. In *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), a union had, prior to a representation election, announced a selective

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[3] The court of appeals denied petitioner's motion for a stay of mandate pending the filing of a petition for a writ of certiorari (Pet. App. 50a-51a); Justice Brennan subsequently denied petitioner's application for a recall and stay of mandate (*id.* at 52a).

waiver of its initiation fee for employees who signed union recognition slips before the election; those employees who did not sign such slips would not get the benefit of the fee waiver. This Court held that the union's selective waiver of its initiation fee impermissibly interfered with the employees' right to choose freely whether to have union representation. The Court said, however, that a union has a legitimate interest in waiving its initiation fee when the waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election" (414 U.S. at 274 n.4). The courts of appeals have since uniformly held that offers to waive fees for all employees currently in the work force, not conditioned on whether the particular employee supported the union, do not interfere with employee free choice in representation elections and therefore are not improper inducements under *Savair Manufacturing*.[4]

In this case, both the Board and the court of appeals followed these controlling principles. See Pet. App. 7a-11a, 22a, 29a. The Board, upheld by the court of appeals, found that the Union's statement here constituted a permissible promise to waive initiation fees for all members of the bargaining unit and could not be read by a reasonable employee as an impermissible promise to waive fees selectively for those employees who voted for the Union. Petitioner's challenge to that conclusion raises only a factual issue that does not warrant review by this Court.

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[4] See, *e.g.*, *NLRB* v. *Dunkirk Motor Inn, Inc.*, 524 F.2d 663, 665 (2d Cir. 1975); *NLRB* v. *Stone & Thomas*, 502 F.2d 957, 958 (4th Cir. 1974); *Thrift Drug* v. *NLRB*, 521 F.2d 243, 244 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976); *NLRB* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-1313 (6th Cir. 1975); *Altman Camera Co.* v. *NLRB*, 511 F.2d 319, 322 (7th Cir. 1975); *NLRB* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (8th Cir.), cert. denied, 423 U.S. 827 (1975); *NLRB* v. *Aaron Bros. Corp.*, 563 F.2d 409, 412-413 (9th Cir. 1977).

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 491 (1951); see *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978). Moreover, there is substantial evidence in support of the Board's conclusion that the only reasonable interpretation of the waiver offer under the circumstances was that the waiver extended to all bargaining unit employees.

The challenged sentence of the Union's letter stated that "[a]ll employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them" (Pet. App. 4a). The regional director concluded (*id.* at 29a) that this statement simply advised employees that, if the Union won the election, all current employees would be excused from payment of the Union's initiation fee: the sentence identifies a benefit—relief from the initiation fee—and states that it would be enjoyed by "all" unit employees. The regional director found it "sufficiently clear" (*ibid.*) that the phrase "if they vote for the Teamsters to represent them" merely identified the only circumstance in which the question of a fee would arise—if the employees selected the Union. This interpretation is supported by the final sentence of the postscript (Pet. App. 4a)—"[a]lso dues will not be payable until there is a signed contract"—which says nothing about the way individual unit members may choose to vote. Rather, it assures employees that, if the Union were voted in, monthly dues would be postponed until the Union obtained its first contract.

2. Petitioner seeks to cloak its challenge to this essentially factual determination in legal terms, but its claims that the Board and the court applied erroneous legal standards are meritless.

a. Petitioner repeatedly argues (Pet. 14, 22-26) that the Board and the court of appeals ignored the rule that, where a waiver offer "is ambiguous and subject to a reasonable interpretation by the employees that they can avoid initiation fees by joining the Union prior to the elec-

tion," it is impermissible under the *Savair Manufacturing* rule. See, *e.g., California State Automobile Ass'n,* 214 N.L.R.B. 223, 224 (1974). But the court of appeals specifically cited this rule (Pet. App. 9a) and went on to conclude that the waiver offer was not ambiguous because the Board's interpretation of the offer was the only "plausible" one (Pet. App. 10a n.3, 11a). The regional director closely analyzed the terms of the offer and found it "sufficiently clear" that the offer had been extended to all employees (*id.* at 29a). Accordingly, there is no basis for petitioner's assertions that the decisions below construe an ambiguous offer in the union's favor.[5]

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[5] Petitioner contends (Pet. 23-24) that the dissenting opinions below show that the offer was ambiguous. But those opinions show only that one member of each tribunal had a different view regarding the meaning of the offer. Two members of the Board and two judges of the court of appeals concluded that the offer was not ambiguous.

Petitioner also cites (Pet. 22-23) a variety of other decisions in an effort to establish ambiguity here. But there is a clear difference between the limited waiver offer to "charter members" in *Coleman Co.,* 212 N.L.R.B. 927, 927-929 (1974), and *Inland Shoe Mfg. Co.,* 211 N.L.R.B. 724 (1974), and the offer made to "all" employees here. While "charter members" may be understood to refer to those joining the union prior to the election because it connotes early membership, the offer here did not distinguish among the employees on any basis ascertainable by the union or its supporters. See also *NLRB* v. *L.D. McFarland Co.,* 572 F.2d 256, 259 (9th Cir.), cert. denied, 439 U.S. 911 (1978) (rejecting the view that use of phrase "any member" rather than any employee was fatally ambiguous). In *Deming Division, Crane Co.,* 225 N.L.R.B. 657, 659 (1976), the union waiver offer was conditioned on pre-election support: it was expressly limited to "anyone joining now during this campaign." Similarly, the waiver offers in *NLRB* v. *Aladdin Hotel Corp.,* 584 F.2d 891, 893 (9th Cir. 1978), and *NLRB* v. *Johnson & Hardin Co.,* 554 F.2d 275, 276 (6th Cir. 1977), were keyed to a decision to join the union during the organizational campaign. In *NLRB* v. *Semco Printing Center, Inc.,* 721 F.2d 886, 889-890 (2d Cir. 1983), the court of appeals upheld the Board's finding, based on credibility determinations, that the union

b. Petitioner's contention (Pet. 14-15) that "the Board and the Third Circuit in effect held that * * * a pre-election promise to waive initiation fees * * * can never amount to an unlawful inducement because, by virtue of the Board's secret ballot election process, no employee would believe that the offer was an inducement to vote for representation[,]" also misconstrues the decisions of the Board and the court of appeals. Neither the Board nor the court stated that a waiver offer is always permissible. They simply recognized that the secret ballot process was a relevant consideration in determining whether the Union's offer was ambiguous. See Pet. App. 10a-11a, 22a n.1. No employee would reasonably believe that the Union's offer was limited to employees who voted for the Union, the court concluded, because the employee would understand that the Union had no way of ascertaining how the employee in fact had voted.[6]

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representative had not limited the waiver offer to employees who joined before the election, but extended it, as here, to all employees working in the bargaining unit at the time any collective agreement was signed.

[6] Petitioner invokes (Pet. 16-19) the language and rationale of this Court's decision in *Savair Manufacturing*, asserting that the Board's decision here "ignores the realities of the situation" (414 U.S. at 277). The Court in *Savair Manufacturing* described the relevant "realities" as the fact that "[w]hatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union[,] * * * [that] [h]is outward manifestation of support [may] serve as a useful campaign tool in the union's hands [and that] while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union" (*id.* at 227-278).

In this case, no employee was asked to make any pre-election manifestation of support that might influence his own vote or the vote of other employees. In addition, the Board, affirmed by the court of appeals, found that no reasonable employee would understand that a

c. Finally, petitioner errs in suggesting (Pet. 19-22) that the court of appeals' decision turns upon the court's assessment of the Union's intent in making the waiver offer. In *California State Automobile Ass'n*, 214 N.L.R.B. at 224, the Board made clear that the proper test in interpreting a waiver offer is the perception of a reasonable employee, not what the employees actually understood the Union to mean or what the Union intended. The court of appeals applied that test in this case. The court discussed the Union's intent in the context of assessing what the employees reasonably could have understood the offer to mean. In that context, the court stated that the Union could not have intended to key its offer to the employees' secret ballot vote because it would never be able to ascertain with certainty which employees had voted for union representation. The court did not hold that, irrespective of the objective impact on the employees, the Union's subjective intent governs. Indeed, the court went on to find that no reasonable employee could interpret the Union's waiver offer as a limited waiver conditioned on an employee's vote in the election. See Pet. App. 12a.[7]

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waiver of initiation fee depended on how he voted in the secret ballot election. The decisions below are therefore entirely consistent with the "realities" recognized in *Savair Manufacturing*, as well as the rationale of that decision. Petitioner suggests (Pet. 17-18, 19) that an employee might believe that the union could ascertain his vote. In view of the clear notices regarding ballot secrecy (see note 2, *supra*), that speculation is wholly unfounded.

[7] Petitioner's suggestion (Pet. 26-28) that the court of appeals erred in not taking into account the closeness of the election result is equally without merit. The Court in *Savair Manufacturing* stated (414 U.S. at 271, 281) that because of the closeness of the election, the impermissible waiver there may well have actually influenced the results of the election. The Court did not hold that the closeness of the election should be a factor in determining whether an offer was impermissibly based on pre-election support under the *Savair* rule. The appropriate

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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inquiry is an examination of the union's offer and other relevant circumstances to determine how a reasonable employee would interpret that offer.

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